92-1305

FILED
FEB 4 1993
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DOUGHBOY RECREATIONAL, INC.,
a Division of Hoffinger Industries, Inc.,
Petitioner

vs.

RICHARD FLECK, DIANE FLECK, Nichols Swim Pools, Inc., JAMES HUBERT, KDI Sylvan Pools, Inc., Poseidon Pools of America, The Gibraltar Corp., and S & V Pools, Inc.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ERNEST R. BAZZANA
PLUNKETT & COONEY, P.C.
900 Marquette Building
Detroit, MI 48226-3260
(313) 965-3900

Counsel for Petitioner and
Counsel of Record

DENNIS J. CLARK
PLUNKETT & COONEY, P.C.
900 Marquette Building
Detroit, MI 48226-3260
(313) 965-3900

Counsel for Petitioner

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the due process guaranty stated in the 5th Amendment to the United States Constitution was violated in this case by a finding of liability following a trial in which the Flecks introduced no evidence as to the essential causation element of their claim?

II.

Whether the decision of the Third Circuit violates Hoffinger's right to equal protection since it treats similarly situated manufacturers differently in the absence of any valid reason for the dissimilar treatment?

III.

Whether Hoffinger's 7th Amendment right to trial by jury was denied as a result of the district court's refusal to instruct the jury on intervening superseding cause?

IV.

Whether a liability verdict can be permitted to stand where it is impossible to determine whether it is based on a legally supported claim?

V.

Whether the Third Circuit's disposition of Hoffinger's argument which asserted that the manufacturer of a replacement pool liner, a component part of a swimming pool, owes no duty to warn, is

contrary to controlling Pennsylvania precedent?

VI.

Whether the district court and the Third Circuit erred reversibly in failing to extend the benefit of the statute of repose to the replacement liner seller (and manufacturer)?

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiffs-Appellants/Cross-Appellees

Richard Fleck and Diane Fleck

Defendants/Cross-Appellees

James Hubert and KDI Sylvan Pools, Inc.

Defendant and Third-Party Plaintiff/Cross-Appellee

Nichols Swim Pools, Inc.

Third-Party Defendant-Appellee/ Cross-Appellant

Doughboy Recreational, Inc., a Division of Hoffinger Industries, Inc.[1]

Fourth-Party Defendants/ Cross-Appellees

Poseidon Pools of America, The Gibraltar Corp., and S & V Pools, Inc.

---

1 Hoffinger Industries, Inc., (Hoffinger) has no parent companies or subsidiaries to list pursuant to Rule 29.1.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i-iii
All Parties to the Proceeding in the United States Court of Appeals for the Third Circuit	iv
Table of Authorities	viii-xii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	2-3
Statement of the Case	
History	3-9
Facts.....	10-17
Reasons for Granting the Writ	
Overview	17-19

ARGUMENTS

I. THE DUE PROCESS GUARANTY STATED IN THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED, AND WAS VIOLATED IN THIS CASE, BY

A FINDING OF LIABILITY FOLLOWING A TRIAL IN WHICH THE FLECKS INTRODUCED NO EVIDENCE AS TO AN ESSENTIAL ELEMENT, i.e., CAUSATION, OF THEIR CLAIM 19

A. Introduction 20-22

B. Analysis 22-29

II. THE DECISION OF THE THIRD CIRCUIT VIOLATES HOFFINGER'S RIGHT TO EQUAL PROTECTION BECAUSE IT TREATS SIMILARLY SITUATED MANUFACTURERS DIFFERENTLY IN THE ABSENCE OF ANY VALID REASON FOR THE DISSIMILAR TREATMENT 29

A. Introduction 30-31

B. Analysis 31-35

III. HOFFINGER'S 7TH AMENDMENT RIGHT TO TRIAL BY JURY WAS DENIED AS A RESULT OF THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON INTERVENING SUPERSEDING CAUSE 35

A. Introduction 36-37

B. Analysis 37-43

IV. THE LIABILITY VERDICT IN FAVOR OF THE FLECKS CANNOT BE PERMITTED TO STAND BECAUSE IT IS IMPOSSIBLE TO DETERMINE WHETHER IT IS BASED ON A LEGALLY SUPPORTED CLAIM 43-47

V. THE THIRD CIRCUIT'S DISPOSITION OF HOFFINGER'S ARGUMENT, WHICH ASSERTED THAT THE MANUFACTURER OF A REPLACEMENT POOL LINER, A COMPONENT PART OF A SWIMMING POOL, OWES NO DUTY TO WARN, IS CONTRARY TO CONTROLLING PENNSYLVANIA PRECEDENT 47-58

VI. THE DISTRICT COURT AND THE THIRD CIRCUIT ERRED REVERSIBLY IN FAILING TO EXTEND THE BENEFIT OF THE STATUTE OF REPOSE TO THE REPLACEMENT LINER SELLER (AND MANUFACTURER) 58-65

Conclusion 65

Appendix

Opinion, U.S. Court of Appeals for the Third Circuit, filed 12/04/92 ..... 1a-40a

Memorandum and Order, U.S. District Court for the Eastern District of Pennsylvania

filed 12/06/91 ..... 41a-63a

Civil Judgment, U.S. District Court for the Eastern District of Pennsylvania, filed 11/21/90 . 64a-65a

TABLE OF AUTHORITIES

Page

CASES:

Akins v. Texas,
325 U.S. 398; 65 S. Ct. 1276; 89 L. Ed. 1692 (1945) 23

Avins v. White,
627 F.2d 637, (3rd Cir. 1980) 44, 46

Ballay v. Legg, Mason, Wood, Walker, Inc.,
925 F.2d 862 (3rd Cir. 1991) 38

Black v. Henry Pratt Co.,
778 F.2d 1278 (7th Cir. 1985) 62

Boehm v. Borough of Bethlehem,
4 Pa. Super. 385 (1897) 39

Bolling v. Sharpe,
347 U.S. 497; 74 S. Ct. 693, 694; 98 L. Ed. 884 (1954) 32

Bosley v. Southern Bell Telephone & Telegraph Co.,
1 F.R.D. 771 (W.D. La. 1941) 37

Brussel v. United States,
396 U.S. 1229; 90 S. Ct. 2; 24 L. Ed. 2d 53 (1969) 24

Campos v. Firestone Tire & Rubber Co.,
98 N.J. 198; 485 A.2d 305 (1984) ... 38

Conti v. Ford Motor Co.,
743 F.2d 195 (3rd Cir. 1984) 21

Continental Illinois Nat'l. Bank & Trust
Co. v. Chicago, Rock Island & Pacific Ry. Co.,
294 U.S. 648; 55 S. Ct. 595;
79 L. Ed. 1110 (1935) 32

Coyne v. Pittsburgh Rys. Co.,
393 Pa. 326; 141 A.2d 830 (1958) ... 39

Di Rago v. American Export Lines, Inc.,
636 F.2d 860 (3rd Cir. 1981) 38

Don Burton, Inc., v. Aetna Life & Casualty Co.,
575 F.2d 792 (9th Cir. 1978) 43

Griebler v. Doughboy Recreational, Inc., et. al.,
160 Wis. 2d 547; 466 N.W.2d. 897
(1991) 31

Hilord Chem. Corp. v. Rico Elec., Inc.,
875 F.2d 32 (2d Cir. 1989) 38

Hinds v. Compair Kellogg,
776 F. Supp. 1102 (E.D. Va. 1991), . 63

Hon v. Stroh Brewery Co.,
835 F.2d 510 (3rd Cir. 1987) 20

Int'l Brotherhood of Boilermakers, et. al. v. Hardman,
401 U.S. 233; 91 S. Ct. 609;
28 L. Ed. 2d 10 (1971) 24

Jacoboni v. V & O Press Co.,
527 Pa. 32; 588 A.2d 476 (1991) 48, 49, 51, 52, 53, 54, 55, 56

Johnson v. Robinson,
415 U.S. 361; 94 S. Ct. 1160;
39 L. Ed. 2d 389 (1974) 32

Matusky v. Haugh's Pools,
610 A.2d 474 (Pa. Super. 1992) 30

McGhee v. Sipes,
334 U.S. 1; 68 S. Ct. 836;
92 L. Ed. 1161 (1948) 32

Mucowski v. Clark,
404 Pa. Super. 197; 590 A.2d 348
(1991) 30, 45

Overpeck v. Chicago Pneumatic Tool Co.,
634 F. Supp. 638 (E.D. Pa. 1986) ... 20

Plantation at Lenox v. Lee,
196 Ga. App. 420; 395 S.E.2d 817
(1990) 31

Powell v. J.T. Posny Co.,
766 F.2d 131 (3rd Cir. 1985) 21

Six Companies v. Hwy. Dist.,
311 U.S. 180; 61 S. Ct. 186;
85 L. Ed. 114 (1941) 48

Staymates v. I.T.T. Holub. Indus.,
527 A.2d 140 (Pa. Super. 1987) 21

Stoner v. New York Life Ins. Co.,
311 U.S. 464; 61 S. Ct. 336;
85 L. Ed. 284 (1940) 48

Thompson v. Louisville,
362 U.S. 199; 80 S. Ct. 624;
4 L. Ed. 2d 654 (1960) 22

United New York & New Jersey Sandy
Hook Pilots Ass'n. v. Halecki,
358 U.S. 613; 79 S. Ct. 517;
3 L. Ed. 2d 541 (1959) 44,
46

United States ex rel. Vajtauer v.
Comm'r of Immigration,
273 U.S. 103; 47 S. Ct. 302; 71 L.
Ed. 560 (1927) 24

United States v. Fotopulos,
180 F.2d 631 (9th Cir. 1950) 37

Wenrick v. Schloemann-Siemag
Aktiengesellschaft,
523 Pa. 1; 564 A.2d 1244 (1989) 49

Wood v. Strickland,
420 U.S. 308; 95 S. Ct. 992;
43 L. Ed. 2d 214 (1975) 25

CONSTITUTIONAL PROVISION:

Amendment V, United States
Constitution 2

Amendment VII, United States Constitution 3

STATUTES:

42 Pa. C.S. § 5536(a) 6, 58

28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

4 American Law of Products Liability Third, § 47:73 61

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was filed on 12/04/92. It is reported at 981 F.2d 107 (3rd Cir. 1992), and a copy is set forth in the within Appendix (App. 1a-40a).

A Memorandum and Order dated 12/06/91 was entered in the United States District Court for the Eastern District of Pennsylvania on 12/09/91. A copy is set forth in the within Appendix (App. 41a-63a). A civil judgment in favor of Respondents, Richard Fleck and Diane Fleck (now Diane Kaskoun), in the amounts of $11,750,000.00 and $293,750.00 respectively was entered in the United States District Court for the Eastern District of Pennsylvania on 11/21/90. A

copy is set forth in the within Appendix (App. 64a-65a).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on 12/04/92. The Petition for Rehearing filed by Hoffinger was denied on 12/31/92.

The Petition for Writ of Certiorari is being filed within ninety (90) days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

> shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved , and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

HISTORY

This is a products liability case based solely on a strict liability failure to warn theory, arising out of

the injuries sustained by Richard Fleck, when he dove head first, from a deck constructed by his friend, James Hubert, into an above-ground swimming pool which was 3-1/2 feet deep. Plaintiffs sued KDI Sylvan Pools, Inc., the pool seller. Joined as third party defendants were Poseidon Pools of America, S & V Pools, Inc., and The Gibraltar Corp., alleged successors to the pool manufacturer. Plaintiffs also sued Nichols Swimming Pools, Inc., (Nichols) the seller of the replacement pool liner that was in the pool at the time of Fleck's accident. Nichols filed a third party complaint against Doughboy Recreational Inc., a division of Hoffinger Industries, Inc., (Hoffinger).[2]

---

2 Plaintiffs did not join Hoffinger as a direct defendant in this case. Rather, the

(Footnote 2 Continued On Next Page)

KDI Sylvan, Poseidon, S & V and Gibraltar, sometime referred to

---

(Footnote 2 Continued From Previous Page)
Flecks sued Nichols and Nichols joined Hoffinger as a Third-Party Defendant on an indemnity theory. Plaintiffs obtained verdicts in the principal amounts of $10,000,000 and $250,000 against Nichols. Nichols obtained a directed verdict against Hoffinger on its indemnity claim.

Prior to the commencement of trial in this case, two matters of significance occurred.

In August, 1989, Plaintiffs filed a praecipe for a writ of summons against Hoffinger in the Court of Common Pleas of Philadelphia County, Pennsylvania. Plaintiffs permitted that writ to lie dormant for two years and on 07/12/91, filed a Complaint against Hoffinger in the Pennsylvania state court. That action was subsequently removed to the United States District Court for the Eastern District of Pennsylvania, Docket No. 91-CV-5089. Counsel for the Flecks have stated that it is their position that the verdicts and judgment in the instant case will have res judicata, collateral estoppel or issue preclusive effect in District Court Case Docket No. 91-CV-5089.

Secondly, prior to trial, Nichols filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. An automatic stay operated to prevent the Flecks from continuing this action against
(Footnote 2 Continued On Next Page)

hereinafter as the "pool defendants", were granted a directed verdict on the ground that Plaintiffs' claims against them were barred by the statute of repose. 42 Pa. C.S. § 5536(a). At the conclusion of the liability phase of trial, the jury answered special verdict questions finding that both Hubert[3]

(Footnote 2 Continued From Previous Page)
Nichols. In order to proceed with this action the Flecks filed a Petition in the Bankruptcy Court requesting relief from the automatic stay. On September 26, 1990, the Bankruptcy Court on Fleck's motion entered its Order Terminating Automatic Stay which, by its terms, permitted the Flecks to continue their action against Nichols but limited their recovery to Nichols' available insurance proceeds.

3 Prior to trial, the Flecks resolved and settled their claim against Hubert in the amount of $300,000.00. Yet, Hubert participated throughout the entire liability phase of the trial ostensibly as an at-risk Defendant. Despite the fact that his liability to the Flecks was wholly extinguished and they had no claim remaining against Hubert, he was not dismissed from the case. Rather, the jury was told time

(Footnote 3 Continued On Next Page)

and Fleck were negligent and that the conduct of both had been a substantial factor in bringing about the harm. The jury apportioned causation, as between Hubert and Fleck, 36% to Hubert and 64% to Fleck. The jury found that the replacement liner was defective and that the defect was a substantial factor in bringing about the harm. As between Hubert and Nichols, the jury further apportioned the 36% causation it had earlier determined to be attributable to Hubert, 60% to Hubert and 40% to the liner. The damages phase of the trial followed with Nichols and Hoffinger as the only parties. At the conclusion, the

---

(Footnote 3 Continued From Previous Page)
and again the untruth that the Flecks had a claim pending against Hubert and the jury was directed and required to resolve that non-existent claim.

jury returned a verdict in the amount of $10,000,000 in favor of Richard Fleck and $250,000 in favor of his ex-wife. On 11/21/90, the district court entered its Judgment in favor of Fleck against Nichols in the amount of $11,750,000 and in favor of his ex-wife against Nichols in the amount of $293,750, representing the verdict plus delay damages in the amounts of $1,750,000 and $43,750, respectively. Nichols' and Hoffinger's post-verdict and post-judgment motions were denied by the District Court on 12/04/91. Hoffinger's Notice of Appeal was timely filed on 12/23/91.

On 12/04/92, the Court of Appeals for the Third Circuit issued an Opinion affirming the verdict and judgment in favor of the Flecks against Nichols. The Opinion, further, held that the Flecks

could not recover against Hoffinger by way of indemnity. Accordingly, the Third Circuit reversed and remanded the case to the district court with the direction that the district court mold the jury verdict to the amount of the insurance proceeds available to Nichols. With respect to Nichols' indemnification claim against Hoffinger, the Court affirmed the grant of a directed verdict in favor of Nichols and, further, held that the district court had erred when it refused to award Nichols' attorney's fees and costs incurred by Nichols in defense of the Flecks' claims. In this regard, the case was remanded for further proceedings.

FACTS

In 1971, KDI Sylvan sold an above-ground pool to Anthony Traviglini. That pool was damaged in a hurricane and in 1972, Sylvan replaced the pool with another, a 4 foot high oval aluminum above-ground pool. In 1978, Mr. Traviglini sold his home to Jerry Jolly and left the pool. Mr. Jolly testified that when he purchased the home and the pool there were no markings of any kind on the liner of the pool nor was there anything on the liner to indicate the depth of the water. In 1983, Mr. Jolly replaced the original liner because the original had developed leaks. The first replacement liner was purchased from Nichols. During the following winter, the first replacement liner developed a leak.

In the Spring of 1984, Jolly sold his home to James Hubert. The pool was included in the sale. Jolly agreed with Hubert to replace the first liner in connection with the sale of the home. In May of 1984, Jolly took the first replacement liner back to Nichols. When he returned to Nichols, he and the Nichols' salesmen spread out the first liner on the ground and the Nichols' representative examined the first liner. The Nichols' representative made no mention of the absence of any warning decals or depth indicator decals on the first replacement liner. The Nichols' representative never advised Jolly to put depth markers or warning signs[4] on the liner.

---

4 The replacement pool liner sold by Nichols to Mr. Jolly was manufactured by Hoffinger. It (Footnote 4 Continued On Next Page)

When Hubert purchased the home, there was a 5 x 7 foot freestanding deck adjacent to the pool. When the 5 x 7 foot deck was in place anyone could see the walls of the pool and could tell that it was a 4 foot above-ground pool. After he purchased the home, Hubert removed the 5 x 7 foot deck and constructed an elaborate deck which obstructed the view

---

(Footnote 4 Continued From Previous Page)
is undisputed that a literature pack accompanied the replacement liner. The literature pack contained a set of decals that the purchaser was to apply to the liner after it had been installed. Those decals stated "no diving, no jumping" and "four foot deep". Plaintiffs' criticism was that the warning signs and depth markers should have been permanently affixed to the liner by the manufacturer at locations above the water line and below the top of the wall of the pool. Hoffinger's quality control manager, Danny Cargile, testified that the warning and depth marker labels cannot be placed directly onto the liner by the manufacturer because, when the liner is installed into the pool, one can never know where the decal or the warning was going to end up.

of side walls of the pool. Richard Fleck testified that the deck blocked his view of the side walls of the pool and had the deck not been there he would have been aware of the depth of the pool.

On 08/08/87, Hubert held a party at his home. Before that, Hubert had sent out invitations to the party which he referred to as the "Fourth Annual Hawaiian Blitz." At the top of the invitation is the handwritten statement "party animals." The invitation states: "Party starts at 2:00 p.m. and is not scheduled to end." The invitation states: "Plenty of beer, wine and frozen drinks on hand." The invitation indicated that Hubert was going to have athletic events including volleyball, horseshoes, swimming, limbo contest, water skiing, deep-sea fishing, polo and

championship wrestling. Hubert testified that he purchased six kegs of beer for the party of which three were consumed. He purchased three 5-liter boxes of wine which 3-1/2 5-liter boxes were consumed. Approximately 150 people attended the party.

Richard Fleck testified that on the morning of the party, he woke up at 6:00 a.m. and went to work for half a day. After work, he returned to his apartment and he and his wife decided to go to the party. The drive from his apartment to Hubert's home took approximately 2-1/2 hours. They arrived at the Hubert home in the mid-afternoon and were there approximately two hours or so before the accident occurred. Fleck admitted that during that 2-hour period he had four or

five 12-ounce cups of beer and admitted smoking marijuana.

At approximately 8:00 p.m., after having been awake for approximately 14 hours, Fleck, his wife, and a friend, Mike Belekevich, decided to go swimming and walked to the top of the deck. Fleck testified that, before diving, he neither looked at nor saw the bottom of the pool. He didn't see the liner along the bottom of the pool. He testified that, before diving, he ". . . just looked down into the water as I was walking over." He testified that he just looked at the water as he was going by. Fleck testified unequivocally that before he dove into the pool he ". . . didn't look at the liner. . . ." He testified that he took a single look into the pool and that look was somewhere towards the

center. In fact, he testified that he did not even know if there was a liner in the pool. Even though he admitted that he did not know the depth of the water, Fleck nonetheless dove in and hit his head on the bottom.

Although it was the Flecks' theory at trial that Fleck's brief look into the water as he was going by led him to believe that the water was six feet deep, Hubert testified that two days after the accident, he visited Fleck in the hospital and Fleck told him that he did not know how the accident had happened and, more significantly, did not claim that he believed the water was at least six feet deep. This testimony was confirmed by Fleck himself.

Fleck testified that he had always swam. He was on the swim team in both

grade school and high school, where he received a varsity letter. He had been in an above-ground pool prior to August, 1987. He dove into that pool. Fleck testified that he had been told as a child that he shouldn't dive into a pool where he did not know the depth. It was his practice, which he followed as he was growing up, to not dive into any body of water where he did not know the depth. Moreover, he knew that there was a risk of injury associated with diving or jumping into any shallow body of water. He specifically knew that he should not dive into a 4 foot deep pool because it was dangerous and he could hurt himself.

REASONS FOR GRANTING THE WRIT

OVERVIEW

This case involves exceptionally important matters which require this

Court's intervention. At stake is the fundamental fairness of the civil legal system. The Constitutional guarantees of due process, equal protection, and the right to trial by jury have all been violated with the result being (indirectly) a multi-million dollar award against the manufacturer of a replacement swimming pool liner, a product which is nothing more than a membrane enabling the containment of water, on a strict liability failure to warn theory. The product itself is not dangerous. Liability has been imposed on the theory that Hoffinger should have told the college-educated Fleck, who admittedly had been drinking and smoking marijuana, that he should not dive head first into water of unknown depth (which unfortunately proved to be shallow). It

is abusive litigation[5] like this which contributes to the erosion of American industry.[6] Something must be done about it. Granting certiorari, and thereafter overturning the judgment, is just that something.

ARGUMENTS

I.

THE DUE PROCESS GUARANTY STATED IN THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED, AND WAS VIOLATED IN THIS CASE, BY A FINDING OF LIABILITY FOLLOWING A TRIAL IN WHICH THE FLECKS INTRODUCED NO EVIDENCE AS TO AN ESSENTIAL ELEMENT, i.e., CAUSATION,

---

5 The trial judge himself stated that ". . . it was difficult to see how the seller of this pool liner could be liable for this accident."

6 The decision of the Third Circuit, as it stands, arguably makes every pool that has ever been sold defective because no manufacturer has ever been able to pre-affix warnings or depth markers on vinyl sheeting that is stretch fitted into a pool as it is an indeterminant dimension.

OF THEIR CLAIM.

A. Introduction

Under Pennsylvania law, a plaintiff asserting a strict liability claim against a product manufacturer or seller must show not only that the product was in a defective condition when it left the control of the manufacturer or seller but also that the defect was a proximate cause of the plaintiff's injury. Hon v. Stroh Brewery Co., 835 F.2d 510, 512 (3rd Cir. 1987). The plaintiff must establish that the presence of a warning would have prevented the accident, and without evidence that warnings would have prevented harm, liability cannot be imposed. Overpeck v. Chicago Pneumatic Tool Co., 634 F. Supp. 638 (E.D. Pa. 1986). Where the theory of liability is failure to warn, the evidence must be

such as to support a reasonable inference, rather than a guess or speculation, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury. Staymates v. I.T.T. Holub. Indus., 527 A.2d 140, 147 (Pa. Super. 1987); Powell v. J.T. Posny Co., 766 F.2d 131, 134 (3rd Cir. 1985). If the relevant facts are not in dispute, the question is one of law. Conti v. Ford Motor Co., 743 F.2d 195 (3rd Cir. 1984).

A reasonable inference does not arise where the testimony demonstrates nothing more than speculation that the warning, if present, would have been observed. Conti, supra, at pp. 198-199. Here, there was no evidence whatsoever to support an inference that the existence of warnings, even if present, would have

prevented the accident from occurring. As a matter of law, it must be concluded that there was no evidence of cause in fact or legal cause shown by Flecks at trial.

B. **Analysis**

Even a layman could be expected to give a negative and unhesitating answer to the question whether the law permits an adjudication of liability when the Plaintiff introduces no evidence of an essential element of his case. As is not infrequently the case with issues as to which there is virtual universal agreement concerning what the law, as a matter of common sense, should be, such a response is in full accord with a basic rule of law.

In Thompson v. Louisville, 362 U.S. 199; 80 S. Ct. 624; 4 L. Ed. 2d 654

(1960), this Court held that a finding, there a criminal conviction, which is totally devoid of evidentiary support is unconstitutional as a denial of due process. See also Akins v. Texas, 325 U.S. 398; 65 S. Ct. 1276; 89 L. Ed. 1692 (1945) (the conclusion of the trier of fact in state criminal prosecutions will not be accepted if it is so lacking support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process).[7]

The rule that due process is violated when there is no evidence to support a finding has been applied in a

---

7 The idea of fairness is inherent in the requirement of due process of law. A defendant is denied due process where he is deprived of that fundamental fairness which is essential to the very concept of justice.

variety of contexts and is not limited to criminal convictions. In United States ex rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103; 47 S. Ct. 302; 71 L. Ed. 560 (1927), this Court held that the deportation of an alien on charges unsupported by any evidence is a denial of due process. In Brussel v. United States, 396 U.S. 1229; 90 S. Ct. 2; 24 L. Ed. 2d 53 (1969), Justice Marshall granted an application for bail pending a Court of Appeals decision where the applicant had been jailed in the absence of any evidence supporting an essential element of the finding that he was in contempt. In Int'l Brotherhood of Boilermakers, et. al. v. Hardman, 401 U.S. 233; 91 S. Ct. 609; 28 L. Ed. 2d 10 (1971), this Court applied the Thompson "no evidence" rule to union disciplinary

proceedings and reiterated that a conviction on charges unsupported by any evidence is a denial of due process. Subsequently, in Wood v. Strickland, 420 U.S. 308; 95 S. Ct. 992; 43 L. Ed. 2d 214 (1975), the due process rationale of Thompson was applied to public school disciplinary proceedings and the Court stated that an individual is denied due process when suspended in the absence of any evidence establishing a violation of a school regulation. The Thompson "no evidence" rule applies here and since the finding of liability is totally devoid of evidentiary support on the essential element of causation, the finding and the resulting judgment are unconstitutional and cannot be permitted to stand.

One significant portion of Fleck's testimony is fatal to their claim because

it shows that there was no evidence of cause in fact or a proximate causal relationship between the absence of a depth indicator or warning on the pool liner and his injury. Fleck testified that, before diving, he neither looked at nor saw the bottom of the pool. He didn't see the liner. He testified that, before diving, he ". . . just looked down into the water as I was walking over." He testified that he just looked at the water as he was going by. Fleck testified unequivocally that before he dove into the pool he ". . . didn't look at the liner. . . ." He testified that he took a single look into the pool and that look was somewhere towards the center. In fact, he testified that he did not even know if there was a liner in the pool. Moreover, he did not observe

any part of the side of the pool before his dive.

Flecks' theory with respect to the replacement pool liner was that it should have had depth markers and "no diving" warnings on the liner, above the waterline, around the sides of the pool. Really now. How can it be said that the absence of a depth marker or warning on a replacement pool liner <u>at the location advocated by the Flecks</u> is the proximate cause of an injury to a plaintiff when he testifies that he did not look at the liner let alone at the liner at the location where it is claimed the depth marker or warning should have been placed? The question answers itself.

To be sure, Flecks argued that they had presented evidence of causation as a result of Fleck's testimony that he would

have been able to see any danger signs or depth markers had they been there. The argument, which is based on Fleck's opinion and not on fact, is a specious one. That argument requires a factual predicate, i.e., that Fleck had looked at the location or area where he asserted the depth markers or warnings should have been, which is wholly absent in this case. Had depth markers or warning signs been present, Fleck could have seen them only if he had looked. He did not look. As a matter of law, it must be concluded that there was no evidence of cause in fact or legal cause shown by Flecks at trial since whether or not there were depth markings or warnings on the replacement pool liner at the location advocated by Flecks would have made no difference whatsoever.

On appeal, the Third Circuit failed to address Hoffinger's argument that Flecks' proofs failed to establish the essential element of causation. The only way this issue could be resolved against Hoffinger is for the panel to have supplied a fact which is unquestionably absent from the record. Due process, and its requirement of fundamental fairness, does not permit a factually unsupported finding to form the basis of adjudication of liability nor does it permit appellate affirmance of such a "finding" let alone an affirmance which fails even to address the issue.

II.

THE DECISION OF THE THIRD CIRCUIT VIOLATES HOFFINGER'S RIGHT TO EQUAL PROTECTION BECAUSE IT TREATS SIMILARLY SITUATED MANUFACTURERS DIFFERENTLY IN THE ABSENCE OF ANY VALID REASON FOR THE DISSIMILAR TREATMENT.

A. **Introduction**

Pennsylvania has held that a manufacturer of a pool liner cannot be held liable when a Plaintiff, who has been careful enough to ascertain the depth of water, dives into shallow water and is injured. Matusky v. Haugh's Pools, 610 A.2d 474 (Pa. Super. 1992). See also Mucowski v. Clark, 404 Pa. Super. 197; 590 A.2d 348 (1991). This is because the danger is open and obvious.

The Third Circuit held that despite the fact that a danger is open and obvious, there is a duty to warn individuals who are subjectively careless and unreasonable when they misjudge the depth of water of admittedly unknown depth. This is not the law in Pennsylvania nor should it be. A duty to warn with respect to open and obvious

dangers, such as the danger of diving into water of unknown depth, see e.g., Plantation at Lenox v. Lee, 196 Ga. App. 420; 395 S.E.2d 817 (1990); Griebler v. Doughboy Recreational, Inc., et. al., 160 Wis. 2d 547; 466 N.W.2d. 897 (1991), cannot be imposed simply because some individuals may be careless. It is a denial of equal protection to preclude recovery against defendants in pool diving cases who are sued by persons responsible enough to determine the depth of water which they dive into while permitting recovery against similarly situated defendants who are sued by persons not responsible enough to determine the depth of water.

B. **Analysis**

The equal protection principle, applicable to federal decision,

Continental Illinois Nat'l. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648, 680; 55 S. Ct. 595, 604; 79 L. Ed. 1110 (1935),[8] through the due process clause of the Constitution's 5th Amendment, Johnson v. Robinson, 415 U.S. 361, 364 n. 4; 94 S. Ct. 1160; 39 L. Ed. 2d 389 (1974), mandates similar treatment under the law for those similarly situated. Bolling v. Sharpe, 347 U.S. 497, 498-499; 74 S. Ct. 693, 694; 98 L. Ed. 884 (1954). Equal protection of the laws, in its constitutional sense, mandates that all litigants similarly situated may set up

---

8 In the state action context, this Court has held that actions in violation of equal protection principles are equally repugnant to the Constitution whether directed by a statute or taken by a judicial official. McGhee v. Sipes, 334 U.S. 1; 68 S. Ct. 836; 92 L. Ed. 1161 (1948).

matters of defense with like protection and without discrimination by judicial action. The power of a federal district court is subject to the limitation that a judicial decree or judgment rendered by it does not violate the equal protection guaranty. That limitation was exceeded in the present case. Hoffinger's equal protection rights were violated.

Hoffinger and Nichols belong to that class of defendants which manufacture and sell component parts of swimming pools and swimming pools themselves. The decision of the Third Circuit treats similarly situated members of this group differently depending upon the claimant he is sued by. It is incongruous and anomalous to think that Pennsylvania would hold that while a manufacturer of a pool liner cannot be

held responsible to a plaintiff who takes the trouble to learn the depth of water before he dives, he can be held responsible to one who doesn't make that effort but, rather, simply "thinks" or "believes" he knows the depth, does nothing to determine if he is correct, and is injured when his belief turns out to be mistaken. There is no valid justification for this dissimilar treatment.

To permit the verdict in this case to stand is to tell Pennsylvania residents that they are better off not making the effort to determine the depth of water before they dive into it because, failing to actually determine the depth of the water, they can hold the provider of a replacement pool liner responsible for their injuries. This

result is completely at odds with Pennsylvania's recognized policy of insisting that all persons exercise care for their own safety. Although one may truly be sorry for the unfortunate victim of a chance accident, courts should not operate for careless consumers in loco parentis by shifting the burden of the consequences of their foolish actions to third parties. Yet, that is precisely what the district court and the Third Circuit have done in this case. The result violates equal protection principles and cannot be permitted to stand in the face of the constitutional violation.

III.

HOFFINGER'S 7TH AMENDMENT RIGHT TO TRIAL BY JURY WAS DENIED AS A RESULT OF THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON INTERVENING SUPERSEDING CAUSE.

A. **Introduction**

At trial, Hoffinger and Nichols (as well as the pool Defendants before the grant of directed verdicts in their favor) asserted that the construction of the deck by the homeowner (Hubert) which obscured the view of the sidewall of the above-ground pool, was, as a matter of law, an unforeseeable intervening cause. District Court Judge Buckwalter, in the course of denying Nichols' Motion for Directed Verdict, stated that he could not decide the issue of superseding cause as a matter of law and then, inexplicably, refused to give a jury instruction on the issue.[9] Moreover, Judge Buckwalter, on page 11 of his

---

9 Before the jury retired to consider its verdict, Hoffinger objected to the refusal to instruct on intervening superseding cause.

12/06/91 Memorandum and Order Denying Post-Judgment Motions ruled that the construction of the deck by Hubert was, as a matter of law, an unforeseeable intervening cause which operated to exonerate the pool Defendants. On these facts, Hoffinger contends that the district court's refusal to instruct on this issue deprived Hoffinger of its 7th Amendment right to trial by jury.

B. **Analysis**

Under the 7th Amendment, there is a right to trial by jury in actions for damages involving personal injuries. United States v. Fotopulos, 180 F.2d 631, 634 (9th Cir. 1950); Bosley v. Southern Bell Telephone & Telegraph Co., 1 F.R.D. 771 (W.D. La. 1941). A proper jury charge is essential for a fair trial.

Campos v. Firestone Tire & Rubber Co., 98 N.J. 198; 485 A.2d 305 (1984).

A litigant is entitled to have the jury instructed as to his claims or defenses and theories of law if supported by evidence and brought to the attention of the Court. Di Rago v. American Export Lines, Inc., 636 F.2d 860, 867 (3rd Cir. 1981); Ballay v. Legg, Mason, Wood, Walker, Inc., 925 F.2d 862 (3rd Cir. 1991). "It does not matter that the evidence was minimal or was presented in a piecemeal fashion. All that is necessary is that there be some evidence supporting a party's theory of the case." Hilord Chem. Corp. v. Rico Elec., Inc., 875 F.2d 32, 38 (2d Cir. 1989). Here the district court's failure to give the requested instruction on superseding intervening cause resulted in a charge

which failed to fairly and adequately state the pertinent legal principles applicable to the case. The result was an effective denial of the right to trial by jury.

Proximate cause is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. Coyne v. Pittsburgh Rys. Co., 393 Pa. 326; 141 A.2d 830 (1958). Where there are two independent causes, either of which could be the proximate cause of the injury, the burden is on the plaintiff to show that the one for which the defendant is responsible was the one which caused the injury. Boehm v. Borough of Bethlehem, 4 Pa. Super. 385 (1897). A defendant is not liable for his tortious conduct if a

"superseding cause" has occurred. A superseding cause is a question to be determined by the trier of fact, even in cases where there is no material dispute concerning the facts, if the inferences to be drawn therefrom are reasonably capable of more than one conclusion.

Flecks' theory of the case was that Fleck dove into the pool because he did not know the depth of the water. Fleck, however, testified that he would not have dived into the pool had he seen the sidewall of the pool and, most significantly, if the deck constructed by Hubert (after the installation of the replacement pool liner) had not blocked his view of the sidewall, he would have known the depth and would not have made the dive. Surely the requested superseding intervening cause instruction

was supported by the evidence. Accordingly, there can be no conclusion but that the district court's refusal to instruct on this material issue deprived Hoffinger of the fair trial it was constitutionally entitled to receive.

This conclusion is reinforced (if any reinforcement is necessary) when one acknowledges that the district court judge's decision in this regard is completely at odds with his other rulings. Judge Buckwalter ruled that the construction of the deck by Hubert was, as a matter of law, an unforeseeable superseding intervening cause which operated to exonerate the pool Defendants. Why should the result be any different for the manufacturer and seller of a replacement pool liner just because their product was manufactured 12 years

later? It should not. Lack of foreseeability is a function of the nature of the intervening conduct or negligence and is not a function of timing as long as it is subsequent to the defendant's conduct. Because the sale of the liner preceded the construction of the deck, the only logical and legally consistent conclusion is that the construction of the deck was, as a matter of law, an unforeseeable intervening cause which operated to exonerate the seller (and manufacturer) of the replacement pool liner. Since Judge Buckwalter premised his grant of the pool seller's directed verdict, in part, on the ground that Hubert's action was a superseding intervening cause, he should have extended that ruling to Nichols and granted its Motion for Directed Verdict.

At a bare minimum, he was required to instruct the jury on the issue since the failure to give an instruction, where merited, effectively directs a verdict for the opposing party on the disputed issue. Don Burton, Inc., v. Aetna Life & Casualty Co., 575 F.2d 792, 706 (9th Cir. 1978). In its 12/04/92 Opinion, the Third Circuit overlooked and failed to decide Hoffinger's argument that the district court's failure to instruct on intervening superseding cause mandated a new trial. Intervention by this Court is necessary to remedy the 7th Amendment violation which has clearly been shown.

IV.

THE LIABILITY VERDICT IN FAVOR OF THE FLECKS CANNOT BE PERMITTED TO STAND BECAUSE IT IS IMPOSSIBLE TO DETERMINE WHETHER IT IS BASED ON A LEGALLY SUPPORTED CLAIM.

A verdict must be set aside where it is impossible to determine whether it is based on a legally supported claim. United New York & New Jersey Sandy Hook Pilots Ass'n. v. Halecki, 358 U.S. 613, 619; 79 S. Ct. 517, 520; 3 L. Ed. 2d 541 (1959); Avins v. White, 627 F.2d 637, 646 (3rd Cir. 1980). In this case, the Third Circuit failed so much as to even address Hoffinger's argument concerning the effect of Fleck's actual subjective knowledge as it related to the foundational "duty" issue and the concomitant effect of submitting Flecks' warning claim to the jury.

Flecks' strict liability case was based on two distinct theories. The first was that the manufacturer and seller of the replacement pool liner had a duty to place "no diving" signs on the

liner. The second theory was that they had a duty to place depth markers on the liner.[10]

Fleck claimed that he did not know the depth of the water in the pool. Moreover, Fleck testified that he knew that he should not dive into a pool where he did not know the depth of the water. Thus, the danger of diving into the water of admitted unknown depth was actually known to Fleck. This actual, subjective knowledge on his part obviated a duty to provide "no diving" warnings. Mucowski v. Clark, 404 Pa. Super. 197; 590 A.2d 348 (1991).

---

10 Plaintiffs' witnesses, Professor Ralph Johnson and Professor Sam Glucksberg, both opined that the liner was defective because it lacked warning signs against diving or jumping and because there were no depth markers.

Accordingly, even assuming for the purpose of argument only that Hoffinger may have had a duty to provide Fleck with information as to the depth of the pool by way of depth markers, Hoffinger and Nichols nonetheless had, as a matter of law, no duty to warn Fleck of the dangers of diving into the water of unknown depth because that danger was actually known to him. Where a general verdict may rest on either of two claims - one legally supported and the other not - a judgment thereon must be set aside. United New York & New Jersey Sandy Hook Pilots Ass'n. v. Halecki, supra; Avins v. White, supra.

This case is controlled by the above-cited authorities. Two theories of liability were submitted to the jury for consideration and the jury returned a

general verdict. Since it is not possible to determine which of the liability theories submitted to the jury were relied upon in reaching the verdict, a new trial is mandated.

V.

THE THIRD CIRCUIT'S DISPOSITION OF HOFFINGER'S ARGUMENT, WHICH ASSERTED THAT THE MANUFACTURER OF A REPLACEMENT POOL LINER, A COMPONENT PART OF A SWIMMING POOL, OWES NO DUTY TO WARN, IS CONTRARY TO CONTROLLING PENNSYLVANIA PRECEDENT.

Hoffinger contends that intervention by this Court is warranted if for no other reason than because the Third Circuit's treatment of Hoffinger's assertion that it, as the manufacturer of the replacement pool liner, a component part of the swimming pool, owed no duty to warn misapplies the controlling case

of Jacoboni v. V & O Press Co., 527 Pa. 32; 588 A.2d 476 (1991).[11]

The only allegations in this case against Hoffinger and Nichols is that Hoffinger manufactured and Nichols sold the replacement pool liner without adequate warnings. Two points are undisputed. There was no evidence presented at trial of any alleged defect in the replacement pool liner other than the failure to warn. Secondly, no one ever claimed that the replacement pool liner was dangerous until it was incorporated into a swimming pool. On

---

11 Supreme Court review is warranted where, as here, a Court of Appeals' decision is in conflict with decisions rendered by the highest court of a state and decisions of a state's intermediate appellate courts. Six Companies v. Hwy. Dist., 311 U.S. 180; 61 S. Ct. 186; 85 L. Ed. 114 (1941), Stoner v. New York Life Ins. Co., 311 U.S. 464; 61 S. Ct. 336; 85 L. Ed. 284 (1940).

these facts, Hoffinger contends that the limitations on a manufacturer's duty to warn contemplated by the Pennsylvania Supreme Court in Jacobini, supra, clearly apply.

In Jacobini, supra, the Court recognized that limits are placed on a manufacturer's duty to warn where, as here, the manufacturer supplies a mere component of a product that is assembled by another party and dangers are associated with the use of the finished product. 588 A.2d at p. 478, citing Wenrick v. Schloemann-Siemag Aktiengesellschaft, 523 Pa. 1; 564 A.2d 1244 (1989). There, the plaintiff sued a die set manufacturer on a strict product liability theory under § 402A. The die set was sold to a builder of a die and incorporated in to the completed die.

The completed die was utilized in a power press. The plaintiff alleged that the die set manufacturer had a duty to warn users of the power press that the press was not to be used without point of operation guards or barrier guards. The Pennsylvania Supreme Court held that the plaintiff's duty to warn theory was untenable because that would require the manufacturer of a mere component of a completed product to warn the end user of dangers associated with using the completed product. The Court held that there is no duty to warn where the component, in and of itself, is not dangerous and where the danger arises when the component is incorporated into the final product. Since the component part manufacturer had no role in the design or manufacture of the completed

product, the Court perceived no basis for requiring the component part manufacturer to warn. The Court held to rule otherwise would carry the component part manufacturer's liability to an unwarranted and unreasonable extreme.[12]

Here, the Third Circuit's decision, on this point, constitutes a refusal to follow controlling state law precedent and should move this Court to review the Court of Appeals' decision. In its Opinion, the Third Circuit noted accurately the Jacobini rationale that ". . . a manufacturer's duty to warn is limited when it supplies a component of a final product that is later assembled by another party and the dangers are associated with the use of the finished

---

12 That is exactly what has happened in the present case.

product . . .", but then failed to apply Jacobini. The distinctions made by the Third Circuit between Jacobini and the instant case are simply wrong and will not stand critical analysis.

The Third Circuit stated that a replacement pool liner has but one purpose, to replace an existing pool liner. How is this any different from a die set, such as that involved in Jacobini, which has but one purpose, to be used as the foundation of a die? There is no difference. The Third Circuit stated that Hoffinger knew that its liner would ultimately be incorporated into a pool and nothing else. How is this any different from a die set manufacturer which knows that its die set would ultimately be incorporated into a completed die and then used in a

power press and nothing else? There is no difference. These are not true distinctions.[13]

---

13 The Third Circuit also stated that the replacement liner is not a component part but is really a separate product. To say that the replacement pool liner is not a component part of the completed product, the swimming pool, is semantic nonsense. Surely, common sense instructs that a swimming pool is the final product of which the pool liner is but a component.

In the same paragraph, but not with any logical consistency, the Third Circuit stated that because manufacturers of component parts of other products are not " . . . immune from liability . . . simply because those products are later incorporated into something else, Hoffinger is likewise not immune from liability." Slip Opinion, p 27. Of course, the error in this reasoning is that it fails to distinguish between liability premised upon a design or manufacturing defect (which is not involved in this case) and liability premised upon a failure to warn theory (which is the only claim presented in this case). The Pennsylvania Supreme Court in Jacobini spoke directly to a failure to warn theory. Whatever the law might be with respect to other claims or theories, that law cannot be relied upon to support the Third Circuit's failure to apply controlling Pennsylvania Supreme Court precedent in the failure to warn context.

The Third Circuit then stated that one can foresee that the liner can create a danger from its inherent condition. This is simply not so. A replacement pool liner standing alone is not dangerous.[14] Otherwise stated, a liner cannot create a danger from its inherent condition. In this regard it is identical to the Jacobini die set. See Jacobini, p. 480. The only danger involved is that associated with the use of the finished product, i.e., the pool. This is unlike the Third Circuit's other example, relating to dynamite. Dynamite

---

14 The danger involved in this case, that of diving into shallow water and striking one's head on the bottom, is a danger associated with the use of the swimming and not the replacement pool liner. It seems absurd to have to state that no one in his right mind would dive head first onto or into a replacement pool liner that had not been incorporated into a swimming pool.

in and of itself is dangerous and does not become so only when incorporated into a final product. The focus is not on the question of whether or not the product actually exerts the injury-causing, physical force. Rather, the focus is on whether the danger exists with respect to the component part or whether the danger is associated with the use of the finished product. Jacobini, supra. Here, it cannot be disputed that there is no danger whatsoever unless and until the pool liner is put into a pool and the pool is filled with water. To the extent that the Third Circuit states that ". . . when the danger arises is irrelevant . . .," Slip Opinion, p. 28, the Third Circuit is mistaken. Jacobini instructs as much when it says that the fact that

the danger arises with the use of the finished product is indeed relevant.

Lastly, Hoffinger contends that the hypothetical advanced by the Third Circuit, Slip Opinion, p. 28, does not support its conclusion. If the pool in this case had been manufactured with warnings on the pool itself as opposed to on the liner and the liner was subsequently replaced, it cannot be said that the pool, thus, became defective. It would retain the warnings it originally had on the final product, i.e., the pool itself. The Third Circuit seems to be saying that the Jacobini court would have ruled differently if the first die set and completed die placed into the press by the press manufacturer had had a warning affixed to it. The Third Circuit seems to suggest that, on

those facts, the manufacturer of every die set and completed die which is subsequently placed into the power press has a duty to place a warning on those die sets. This is not the law as stated by the Supreme Court of Pennsylvania. Where, as here, danger is associated with the use of the finished product it is the manufacturer of that product, and not the manufacturer of a component of that product, which has the burden of warning.

Hoffinger contends that to impose liability upon it, as the manufacturer of the replacement pool liner, a component part of the final product, is akin to imposing liability on God and the water company for supplying the water which was in the pool at the time of Fleck's accident. Neither is permissible.

VI.

THE DISTRICT COURT AND THE THIRD CIRCUIT ERRED REVERSIBLY IN FAILING TO EXTEND THE BENEFIT OF THE STATUTE OF REPOSE TO THE REPLACEMENT LINER SELLER (AND MANUFACTURER).

At trial, Defendant, KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, and Third Party Defendants, Poseidon Pools of America, S & V Pools, Inc., and The Gibraltar Corp., moved for a directed verdict on the ground that Flecks' claim against them was barred by the 12-year statute of repose set forth in 42 Pa. C.S. 5536(a).[15] The District Court

---

15 Section 5536 states in pertinent part:

"(a) General rule. --

Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction or construction of any improvement to real property must be commenced within 12 years

(Footnote 15 Continued On Next Page)

determined that (1) the above-ground pool was an improvement to real property and (2) the pool Defendants fell within the group of persons or entities who were entitled to the benefit of the statute.

The Third Circuit held that the district court had properly granted the directed verdict of the pool seller on the basis of the statute of repose. The Third Circuit then, however, failed to discuss or, for that matter even mention, the issue of whether the district court

---

(Footnote 15 Continued From Previous Page)
after completion of construction to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

* * *

(3) Injury to the person or for wrongful death arising out of such deficiency."

erred in failing to extend the benefit of § 5536 to the replacement liner seller and manufacturer. The Third Circuit, thus, overlooked an essential and dispositive issue.

In the present case, the only asserted defect in either the pool or the replacement liner was an asserted failure to warn of the dangers involved of diving into the pool and an asserted failure to provide depth markers. It is further undisputed that the replacement liner was no different than the liner originally sold with the pool, i.e., there was no claim that the original liner had permanently affixed "no diving" signs or depth markers. Moreover, it is undisputed that the replacement pool liner provided to Mr. Jolly in 1984 was not defective in and of itself and,

therefore, not dangerous. The only claim is that the replacement pool liner became dangerous when incorporated into the final product, the pool. Under these circumstances, to the extent that the statute of repose enured to the benefit of the pool seller it similarly should have been extended to the manufacturer and seller of the replacement pool liner.

The time period in a statute of repose does not begin to run anew with respect to a replacement part for a product where the alleged defect in the replacement part is based on the original design of the product. 4 American Law of Products Liability Third, § 47:73. The replacement of a part of a product with a substitute part, having the same design as the original part, does not begin the running of the statute of repose anew and

any action based upon the failure to warn of a claimed danger in the product, with the replacement part, is timed barred when it is barred as to the original.

In Black v. Henry Pratt Co., 778 F.2d 1278 (7th Cir. 1985), the Seventh Circuit rejected the contention that the sale of replacement parts should extend or toll the period of repose. There, the plaintiffs asserted the "unique" argument that the replacement part supplier's failure to give warnings, identical to the warnings plaintiffs asserted should have been given when the product was delivered, made the replacement parts unreasonably dangerous when supplied. The Seventh Circuit held that the replacement of a component part of a product with a substitute part having the same design as the original part does not

begin the running of the statute of repose anew and that any action based upon the failure to warn of a claimed danger in the final product was barred.

In Hinds v. Compair Kellogg, 776 F. Supp. 1102 (E.D. Va. 1991), the statute of repose barred a claim with respect to the product as originally designed and manufactured. The plaintiff attempted to avoid the application of the statute by arguing that the installation of replacement parts within the ten-year repose period was sufficient to avoid the repose bar. The court rejected the argument noting that the failure to warn theory concerning the replacement parts was identical to the failure to warn theory asserted with respect to the original sale. The court emphasized that the allegations concerning the

replacement parts were nothing more than a rehashing of the asserted defects that existed in the original product. 776 F. Supp. at p. 1108.

The same analysis and result should obtain here. Like the Black and Hinds plaintiffs, Fleck's failure to warn allegations were identical with respect to the original product, i.e., the pool sold by KDI Sylvan, and the original product with the replacement liner manufactured by Hoffinger and sold by Nichols. On these facts, application of the statute of repose should, as a matter of law and logic, have been extended so as to bar the claim of the Flecks against Nichols. The district court's failure to afford Nichols and Hoffinger the benefit of the statute of repose constitutes a departure from the accepted and usual

course of judicial proceedings and calls for an exercise of this Court's power of supervision.

CONCLUSION

Based upon the reasons stated above and the record as a whole, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit.

PLUNKETT & COONEY, P.C.

By: ERNEST R. BAZZANA
Counsel for Petitioner
and
Counsel of Record

DENNIS J. CLARK
Counsel for Petitioner

APPENDIX

Filed December 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2045

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

RICHARD FLECK and DIANE FLECK,
Appellants

No. 91-2090

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

HOFFINGER INDUSTRIES, INC., (Incorrectly
Designated as Doughboy Recreational, Inc.,
a Division of Hoffinger Industries, Inc.),

Appellant

No. 92-1001

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

NICHOLS SWIM POOLS, INC.,

Appellants

No. 92-1077

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

GIBRALTAR CORPORATION,

Appellant

No. 92-1090

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

S & V POOLS, INC. and
POSEIDON POOLS OF AMERICA, INC.,

Appellant

No. 92-1137

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

RICHARD FLECK and DIANE FLECK,

Appellants

No. 92-1138

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

HOFFINGER INDUSTRIES, INC., (Incorrectly
Designated as Doughboy Recreational, Inc.,
a Division of Hoffinger Industries, Inc.),

Appellant

No. 92-1165

RICHARD FLECK; DIANE FLECK;

V.

KDI SYLVAN POOLS, INC.,
a/k/a SYLVAN POOLS;
MUSKIN, INC.; NICHOLS SWIM POOLS, INC.;
JAMES HUBERT

V.

S.K. PLASTICS, INC.;
DOUGHBOY RECREATIONAL, INC., a
Division of HOFFINGER INDUSTRIES, INC.

V.

ATREO MANUFACTURING CO., INC.;
POSEIDON POOLS, INC.;
POSEIDON POOLS OF AMERICA, INC.;
GIBRALTAR FACTORS CORP.;
THE GIBRALTAR CORPORATION;
S & V POOLS, INC.;
ESTHER WILLIAMS SWIMMING POOL COMPANY;
ESTHER WILLIAMS POOLS, INC.; and
ESTHER WILLIAMS ALL ALUMINUM SWIMMING
POOL COMPANY

S & V POOLS, INC. and
POSEIDON POOLS OF AMERICA, INC.,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action No. 89-01348)

Argued July 31, 1992

Before: BECKER, MANSMANN and NYGAARD,
Circuit Judges

(Opinion Filed December 4, 1992)

DAVID F. BINDER, ESQUIRE
A. ROY DECARO, ESQUIRE (Argued)
Raynes, McCarty, Binder, Ross & Mundy
1845 Walnut Street

Suite 2000
Philadelphia, PA 19103
Attorney for Appellants/Appellees
Richard and Diane Fleck

GARY B. CUTLER, ESQUIRE
RICHARD A. KRAEMER, ESQUIRE (Argued)
Margolis, Edelstein, Scherlis,
Sarowitz & Kraemer
Sixth and Walnut Streets
The Curtis Center, 4th Floor
Philadelphia, PA 19106
Attorneys for Appellee KDI Sylvan Pools

HARRY G. MAHONEY, ESQUIRE (Argued)
Deasey, Mahoney, Bender & McKenna
215 South Broad Street
Suite 700
Philadelphia, PA 19107
Attorney for Appellee/Appellant Nichols
Swim Pools

MARK H. SCOBLIONKO, ESQUIRE
Scoblionko, Scoblionko, Muir &
Bartholomew
40 South 5th Street
Allentown, PA 18105
ERNEST R. BAZZANA, ESQUIRE (Argued)
Plunkett & Cooney
900 Marquette Building
Detroit, MI 48226
DENNIS J. CLARK, ESQUIRE
Plunkett & Cooney
429 Forbes Avenue
1212 Allegheny Building
Pittsburgh, PA 15219

Attorneys for Appellee/Appellant
Doughboy Recreational, Inc.

SAMUEL GOLDBLATT, ESQUIRE
Saperston and Day, P.C.
1100 Goldome Center
One Fountain Plaza
Buffalo, NY 14203-1486
Attorney for Appellees Poseidon Pools
and Gibraltar

GEORGE F. DALE, ESQUIRE (Argued)
Dale & Korolishin
6445 Rising Sun Avenue
Philadelphia, PA 19111
Attorney for Appellee/Appellant Poseidon
Pools America and S & V Pools

ANGELO L. SCARICAMAZZA, JR., ESQUIRE
(Argued)
Naulty, Scaricamazza & McDevitt
1617 JFK Boulevard
One Penn Center at Suburban Station
Philadelphia, PA 19103
Attorney for Appellee/Appellant
Gibraltar Corp.

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Richard Fleck dove into a three-and-half foot deep above-ground swimming pool, broke his neck, and was rendered a quadriplegic. The pool and its replacement pool liner did not have depth markers or "No Diving" warnings. The Flecks contended that the homeowner was negligent and that the

sellers of the pool and replacement liner were strictly liable for failing to warn under Pennsylvania law.

I.

FACTS AND PROCEDURE

In 1971, Sylvan sold an above-ground pool for $875 to a homeowner. The pool was damaged in a hurricane, and in 1972 Sylvan replaced it with another. The replacement was a four foot high above-ground pool with neither depth markers nor diving warnings. It has never been removed or disassembled. The pool liner developed a leak; so, it was replaced with a liner sold by Nichols and manufactured by Doughboy Recreation Inc., a division of Hoffinger Industries, Inc. Like the pool itself, the replacement liner did not have warnings affixed, although it did come with decals (which were never used). When James Hubert bought the house in 1984, he built an elaborate, three-tiered deck system around the pool, which completely obstructed the view of the pool's side walls.

Hubert decided to throw a large party, referred to as the "Fourth Annual Hawaiian Blitz." The invitation stated, "Plenty of beer, wine and frozen drinks on hand." It indicated that Hubert was going to have athletic events including swimming. Six kegs of beer and three 5-liter boxes of wine were available.

Richard Fleck and his wife Diane arrived at Hubert's home in the early evening. In a two hour period Fleck consumed four or five 12-ounce cups of beer, smoked marijuana, and decided to go swimming. He climbed to the top of the deck system surrounding the pool, dove in head first,

hit his head on the bottom of the pool, and broke his neck. Fleck, who had never used this pool, testified that the pool looked six feet deep. This was corroborated by Hubert, who testified that sometimes the pool looked twelve feet deep. Fleck further testified that had there been depth markers or warnings he would have seen them and would have known not to dive into a four foot deep pool.

The Flecks sued Hubert, alleging negligence. They also brought strict product liability claims against Sylvan, the pool seller, and Nichols, the seller of replacement liner. Sylvan joined Poseidon Pools of America, S & V Pools Inc., and The Gibraltar Corporation, the alleged corporate successors of the defunct pool manufacturer Atreo Manufacturing Company (which is not a party to this action) as third-party defendants. Nichols filed a third-party complaint for indemnification against Hoffinger, the manufacturer of the liner. Hoffinger did not file cross-claims against the three third-party defendants.

Before trial, the Flecks released Hubert from any liability for $300,000. They further agreed that in any action in which Hubert is found to be a tortfeasor, the amount of the verdict would be reduced by the pro rata or comparative share of Hubert's fault.

Also before trial, Nichols filed a petition for bankruptcy under Chapter 11. Its assets were protected by the automatic stay provision of 11 U.S.C. § 362. To lift the stay, the Flecks petitioned the bankruptcy court and agreed that any recovery in their action against Nichols "will be limited solely to the proceeds of the applicable insurance of the Debtor Defendant Nichols Swim Pools, Inc."

With this understanding, the bankruptcy court lifted the stay.

At trial, the district court directed verdicts for Sylvan and the three third-party defendants, reasoning that the action was time barred by the statute of repose, 42 Pa. C.S. § 5536. The court also directed a verdict for Nichols on its third-party indemnification action against Hoffinger. This was done with Hoffinger's tacit, if not express, consent. The court, however, denied Nichols' request for attorney's fees and costs incurred in the defense of the liability indemnified against.

At the end of the liability trial, the jury answered special interrogatories. It found both Hubert and Fleck negligent and that their combined negligence was a substantial factor in bringing about Fleck's injury. As between Hubert and Fleck, the jury apportioned causation 36% to Hubert and 64% to Fleck. Since no liability attaches to a defendant in a negligence action if his comparative fault is less than the plaintiff's, 42 Pa. C.S. § 7102(a), even without the settlement Hubert would not have been liable to the Flecks.

The jury also found that the liner lacked an element necessary to make it safe for reasonably foreseeable use, and that the defect was a substantial factor in bringing about the harm. As between Hubert and Nichols, it apportioned Hubert's 36% responsibility for causation, 60% to Hubert and 40% to Nichols.

The jury returned a verdict awarding $10 million to Fleck and $250,000 to his wife. The district court entered judgment in the amount of $11,750,000 and $293,750, representing the verdict and delay damages. Nichols and the Flecks

settled for $2,092,513, which the Flecks contend partially satisfies the judgment.

Since Nichols' liability shifted to Hoffinger by way of indemnification, and since all other parties have been found not liable, the money trail ended with Hoffinger. Hoffinger and Nichols filed post-judgment motions for, among other things, judgment notwithstanding the verdict and for a new trial. Nichols withdrew its motions for JNOV and new trial, but not its motion requesting attorney's fees and costs for the indemnification action. The court denied all motions.

The Flecks, Nichols and Hoffinger appeal. The Flecks appeal the order directing verdict for Sylvan under the statute of repose. Nichols appeals the denial of attorney's fees and costs in its indemnification action against Hoffinger. The bulk of this appeal belongs to Hoffinger, which appears to contest all orders and decisions affecting its liability.

II.

ANALYSIS

We apply Pennsylvania product liability law. The Pennsylvania Supreme Court has adopted Section 402A of the Restatement (Second) of Torts. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). That section imposes strict liability upon the seller of "any product in a defective condition unreasonably dangerous to the user or consumer."

Absent clear guidance from the Pennsylvania Supreme Court, we must predict how it would decide the issues and will, when persuasive, rely on decisions of the intermediate appellate court, unless we are convinced that the supreme court

would decide otherwise. *West v. American Telephone & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183 (1940); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir. 1980).

We have examined the myriad of issues presented and conclude that only these merit discussion:

1. Whether directed verdict for defendant Sylvan was proper under the Pennsylvania statute of repose;

2. Whether Hoffinger waived its right to appeal the directed verdict against it in Nichols' third-party indemnification action;

3. Whether Nichols is entitled to attorney's fees and costs in its indemnification action;

4. Whether, as a matter of law, a manufacturer of a replacement pool liner has a duty to warn of the pool depth or dangers of diving into a shallow above-ground pool;

5. Whether, as a matter of law, the dangers of diving into this pool of unknown depth was open and obvious, relieving Hoffinger of a duty to warn;

6. Whether Pennsylvania recognizes a contributory negligence defense or a comparative negligence scheme of apportioning damages in a strict liability action for failure to warn;

7. Whether the jury verdict should be reduced to an amount equal to the insurance proceeds available to Nichols.

A.

Directed Verdict For Sylvan

The district court directed a verdict for Sylvan, the pool seller, because it believed the Flecks' suit to be time-barred by the Pennsylvania statute of repose, which provides:

> (a) General Rule. — Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:
>
> * * *
>
> (3) Injury to the person or for wrongful death arising out of such deficiency.

42 Pa. C.S. § 5536. Whether the directed verdict is proper is a question of Pennsylvania law. We exercise plenary review. *Compagnie des Bauxites de Guinee v. Insurance Co. of N. America*, 724 F.2d 369, 371 (3d Cir. 1983).

For the statute to apply, a defendant must show (1) that 12 years have lapsed since the construction, (2) that the construction is an "improvement to real property," and (3) that he falls within the class of persons the statute protects. There is no dispute that over 12 years have elapsed. We consider the latter two issues.

In *McCormick v. Columbus Conveyer Co.*, 522 Pa. 520, 564 A.2d 907 (1989), the Pennsylvania Supreme Court defined "improvement" as:

> A valuable addition made to property (usually real estate) or an amelioration in its condition,

> amounting to more than mere repairs or replacement, costing labor or capital, and, intended to enhance its value, beauty or utility or to adapt it for new or further purposes.

564 A.2d at 909, quoting Black's Law Dictionary 682 (5th ed. 1979). The court believed that this definition comports with the plain and common usage of the term "improvement." Under this definition, the court rejected the plaintiff's argument that a coal delivery system, a part of a powerhouse, which provided heat and hot water for sixty-eight buildings, was a "product." It held that the system was an improvement to real property as a matter of law. *Id.* at 909-10.

The Pennsylvania courts have consistently applied "improvement" with an eye towards giving that term an ordinary meaning. See *Catanzaro v. Wasco Prod., Inc.*, 339 Pa. Super. 481, 489 A.2d 262, 265 (1985) (a skydome/skylight is an improvement); *Mitchell v. United Elevator Co.*, 290 Pa. Super. 476, 434 A.2d 1243, 1249 (1981) (an elevator); *Fetterhoff v. Fetterhoff*, 354 Pa. Super. 438, 512 A.2d 30, 31 (1986) (same); *Goodrich v. Luzerne Apparel Mfg. Corp.*, 356 Pa. Super. 148, 514 A.2d 188, 189 (1986) (an electrical panel board); *McConnaughey v. Building Components, Inc.*, 401 Pa. Super. 329, 585 A.2d 485, 487 (1990) (a roof truss), allocatur granted, 593 A.2d 842 (1991); *Radvan v. General Elec. Co.*, 394 Pa. Super. 501, 576 A.2d 396, 397 (1990) (a weld and side trim machine).

In *Ferricks v. Ryan Homes, Inc.*, 396 Pa. Super. 132, 578 A.2d 441 (1990), the court held that plywood, later incorporated into a structure, is not an improvement to real property. It reasoned, "The

plywood was simply a component part of a wall or floor which eventually made up the improvement on the real estate." 578 A.2d at 443. The unreasonable and extreme burden of imposing liability upon the manufacturers of every nut, nail or screw is manifest.

In *Noll v. Paddock Pool Builders, Inc.*, — Pa. Super. —, 611 A.2d 219 (1992), the court addressed the issue whether starting blocks bolted to a swimming pool are an improvement to real property. Borrowing the analysis the Pennsylvania Commonwealth Court used to define "real property" for the purposes of sovereign immunity (see Pa. C.S. § 8541 et seq.), the court categorized "improvement to real property" into three groups. *Id.* at 224. The first includes items that are manifestly furniture, as distinguished from improvements, and not affixed to the real property. The second includes items that are so annexed to the property that they cannot be removed without materially injuring the items or the real estate. The third includes items that, albeit physically connected to the property, are so affixed as to be removable without destroying or injuring them or the real estate; these become part of the realty or remain personalty, depending on the intention of the annexing party at the time of annexation. *Id.* at 224, citing *Canon-McMillan School District v. Bioni*, 127 Pa. Commw. 317, 320-21, 561 A.2d 853, 854 (1989). In determining intent, "it is not so much what a particular party intended his legal rights to be, as it is what intended use of the property was manifested by the conduct of the party." *Id.* at 225, quoting *Bioni*, 561 A.2d at 854-55 (internal quotation marks omitted).

While these guidelines are an "aid [to] our Court's analysis of what constitutes an improvement to real property," *id.*, until adopted by the Pennsylvania Supreme Court they do not finally define "improvement." Ultimately, "the determination of what constitutes an improvement to real property is made on a case-by-case basis." *Id.* at 222.

This above-ground swimming pool is an improvement to real property. If we apply the *Noll* guidelines, the pool fits into category three. That is, the parties intended to annex the pool as a part of the real property. While Hoffinger makes much of the fact that the pool came in a box, the pool has never been moved or disassembled. Several homeowners have gone to the trouble of building decks around the pool, including the defendant Hubert who built an elaborate, three-tiered deck.

Also, a qualitative examination of the pool's physical features shows that it is an improvement to real property. It is a large, stationary object on the land, measuring 15 by 30 feet in length and width and holding thousands of gallons of water. It has remained on the property for the past 20 years. It required a permit, land preparation (including foundation), adds to the value of the real estate, and cost $875 twenty years ago. It is generally more akin to a "finished product such as window, skydome, or elevator [which] is meant for use solely as a fixture, as an improvement to real estate," see *Ferricks*, 578 A.2d at 445, than a component material such as plywood. Cf. *Radvan*, 576 A.2d at 397 (weld and side trim machine is improvement to real property; it had been in place for more than 30 years, had never been moved,

was bolted to the floor and connected to conduit piping for power, and was so heavy it would be difficult to dismantle).

The remaining issue is whether Sylvan is a protected person. The statute identifies its class not by the status or occupation of its members, but rather immunizes from liability "any" person lawfully performing or furnishing the activities listed in the statute. *McCormick*, 564 A.2d at 910. "The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." *Id.* (quoting *Leach v. Philadelphia Savings Fund Society*, 234 Pa. Super. 486, 340 A.2d 491, 493 (1975)).

In *Catanzaro* the Pennsylvania Superior Court held that the manufacturer/seller of a skydome fell within the purview of the statute. The appellant there argued that the correct test was whether the supplier customized its product to the real estate and assisted in the installation. In rejecting this argument, the court noted that it had in *Mitchell* rejected the narrow view that the manufacturer of a ready-made item, merely incorporated into the building, was not protected. See *Mitchell*, 434 A.2d at 1249 ("that the basic design of the elevator may be identical in different buildings does not render the elevator any less an improvement to real estate"). The court concluded that the manufacturer/seller planned, designed and built the skydome, and therefore was a protected person. 489 A.2d at 266.

The inquiry is whether Sylvan lawfully furnished or performed any of the listed activities in the statute. *Leach*, 340 A.2d at 493. It is irrelevant whether Sylvan actually installed the pool, because the Pennsylvania Superior Court has rejected the

notion that the supplier of a product "had to assist in its installation." *Catanzaro*, 489 A.2d at 266.

The statute provides that any person "furnishing the . . . supervision or observation of construction, or construction" of any improvement to real estate is protected. Sylvan furnished the construction; it sold the pool and, according to Fleck, contracted with someone to construct the pool. One homeowner testified that he had "left the installation totally up to KDI Sylvan." Under the plain reading of the statute, Sylvan is within the class of persons protected by the statute. We hold that the claim against Sylvan was time-barred and the directed verdict for Sylvan was proper under the Pennsylvania statute of repose.

Sylvan brought the purported corporate successors of the pool manufacturers (S & V, Gibraltar, and Poseidon) into this action. No other party has a claim against these third-party defendants. So, with Sylvan out of this case, they are too. Consequently, although the three defendants appeal the district court's refusal to enter summary judgment for them, we need not reach this issue because it is now moot.

B.

Directed Verdict For Nichols

The district court directed verdict for Nichols in its indemnification action against Hoffinger. In denying a post-judgment motion for reconsideration, the district court noted that Hoffinger waived the right to complain. The parties do not dispute that Hoffinger failed to object to the entry of directed verdict.

It is axiomatic that a party who fails to object to errors or to raise issues at trial waives the right to complain on appeal. This requirement is imposed so that courts have an opportunity to avoid errors, thus obviating an appeal. See Wright & Miller, 9 Federal Practice & Procedure, § 2472 at 454 (1971). If the trial court grants a motion for directed verdict, "an adverse party who did not object to the lack of grounds in the trial court may not raise this point in the appellate court." *Id.* § 2533 at 582.

We may, however, review a waived issue under exceptional circumstances. *Frankl Found Co. v. Alger-Rau & Assoc., Inc.*, 513 F.2d 581, 586 (3d Cir. 1975). Exceptional circumstance have been recognized where the public interest requires that the new issue be heard on appeal or when manifest injustice would result from the failure to consider the new issue, *Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981), or where it is apparent that counsel failed to object to a fundamental and highly prejudicial error resulting in a miscarriage of justice, *Freifield v. Hennessy*, 353 F.2d 97, 99 (3d Cir. 1965).

Hoffinger contends that its counsel's failure to object was a fundamental and highly prejudicial error resulting in a miscarriage of justice. The essence of this argument is that because counsel's error adversely affected its case, we should consider the merits of the issue. Many errors by one's counsel prejudice a case; but few are said to be a miscarriage of justice. Mere prejudice is insufficient to retrieve an abandoned issue. This trial colloquy further refutes Hoffinger's argument:

Mr. Mahoney [counsel for Nichols]: As such your Honor, putting the issue of indemnity to the Jury I think would be a fruitless exercise and I would ask the Court to direct the Jury to return a verdict for Nichols in the event that they find the liner to be defective.

The Court: All right, Mr. Korn?

Mr. Korn [counsel for Hoffinger]: I think that in terms of the issues raised by Mr. Mahoney that *the Court, as a matter of law, without having the Jury do it, can, at the appropriate time, direct a verdict* as he is requested, because I will agree that up until the time —

The Court: Right.

Mr. Korn: — there was certainly evidence to keep his client in the case for a separate reason. *But it's not a Jury question.*

* * *

The Court: Then it's appropriate to grant the directed verdict for Nichols in this case.

(Emphasis added.) The next day, the district court entered the directed verdict. Other than correcting the district court as to the proper business name to be entered, counsel for Hoffinger did not object.

When a litigant takes an unequivocal position at trial, he cannot on appeal assume a contrary position simply because the decision in retrospect was a tactical mistake, or perhaps a candid but regretted concession. *Meiners v. Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977); *Alexander v. Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 & n.1 (8th Cir. 1976). See *Childs v. Franco*, 563

F.Supp. 290, 292 (E.D. Pa. 1983) ("If unequivocal, an admission of counsel during the course of trial is binding on the client."); *Sule v. Workmen's Compensation Appeal Bd.*, 121 Pa. Commw. 242, 550 A.2d 847, 849 (1988) ("It is well settled that an admission of an attorney during the course of a trial is binding upon his client."). We find no miscarriage of justice or any other exceptional circumstances, and hold that Hoffinger waived the right to contest the district court's directed verdict for Nichols. In any event, we have also reviewed the substance of Hoffinger's arguments and conclude they are meritless.

C.

Attorney's Fees

Although Nichols was brought into this suit on a strict liability theory for selling a defective product that Hoffinger manufactured, and although Hoffinger agreed to the entry of a directed verdict in Nichols' indemnification action, the district court denied Nichols' claim for attorney's fees and costs.

The general rule is that an indemnitee may recover attorney's fees and costs incurred in defense of the liability indemnified against from the indemnitor. *A.C. Israel Commodity Co. v. American-West African Line, Inc.*, 397 F.2d 170, 172 (3d Cir. 1968). Pennsylvania law is no different. The Pennsylvania Supreme Court has favorably cited the Restatement (Second) of Torts, § 914(2) (1976), which provides:

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a

> third person is entitled to recover reasonable compensation for the loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

Vattimo v. Lower Bucks Hosp., Inc., 502 Pa. 241, 465 A.2d 1231, 1235 (1983). The court has also held that "an indemnitee may recover attorney's fees and costs from the indemnitor notwithstanding the fact that these expenses have already been paid by the indemnitee's insurance carrier." *Boiler Eng'r & Supply Co. v. General Controls, Inc.*, 443 Pa. 44, 277 A.2d 812, 814 (1971). The court, however, limited these fees to defense litigation and did not extend them to the indemnification litigation. *Id.* Accord *Fisher v. United States*, 299 F.Supp. 1, 34 (E.D. Pa. 1969), reversed on other grounds, 441 F.2d 1288 (3d Cir. 1971); *Papas v. Kohler Co., Inc.*, 581 F.Supp. 1272, 1273 (M.D. Pa. 1984). Thus, in an indemnification action under Pennsylvania law, the indemnitee is entitled to attorney's fees and costs incurred in the underlying defense litigation.

The district court erred by denying Nichols' request for attorney's fees. We will reverse this portion of the district court's order and judgment and remand the cause to the district court.

D.

Duty To Warn

The district court submitted to the jury the issue whether the replacement pool liner was defective because Hoffinger failed to affix depth markers and warnings about the dangers of diving. Hoffinger contends that because a replacement pool liner is a component part that is later incorporated into a

final product, the manufacturer of a pool liner owes no duty to warn as a matter of law.

In *Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 588 A.2d 476 (1991), a die set lacked warnings to caution that dies should be used only in areas equipped with barrier guards. The die set was later incorporated into a power press whose barrier guard was removed. Plaintiff was injured when he misaligned the tool holder in the die, causing parts of the die to be expelled from the press. Plaintiff sued under a failure to warn theory.

The Pennsylvania Supreme Court held that because the evidentiary record was insufficient to support submitting a failure to warn theory to the jury, the plaintiff failed to demonstrate the alleged defect proximately caused the injury. 588 A.2d at 478. The court added dictum, however, that a manufacturer's duty to warn is limited when it supplies a component of a final product that is later assembled by another party and the dangers are associated with the use of the finished product. *Id.* at 479, citing *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 523 Pa. 1, 564 A.2d 1244 (1989) (manufacturer of an electrical control system had no duty to guard a switch in the system because the system was not defective and the danger arose from the placement of the system in the final product by another manufacturer). See *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (1975) (manufacturer is not liable if the product, safe when it leaves the maker's hands, is *made* unsafe by subsequent changes in the stream of commerce). "This is particularly true where the component itself is not dangerous, and where the danger arises from the manner in which the

component is utilized by the assembler of the final product, this being a matter over which the component manufacturer has no control." *Jacobini*, 588 A.2d at 479.

The *Jacobini* court explained that the die set manufacturer "cannot be expected to foresee every possible risk that might be associated with use of the completed product, the die, which is manufactured by another party, and to warn of dangers in using that completed product in yet another party's finished product, the power press." *Id.* at 480. It would be unreasonable and unwarranted to recognize liability in such a tenuous chain of responsibility. *Id.*

The limitation envisioned in *Jacobini* is inapplicable here. A replacement pool liner is not the type of component part that would relieve a manufacturer's duty to warn: It has but one purpose, to replace an existing pool liner. Since Hoffinger knew that its liner would ultimately be incorporated into a pool, and nothing else, it can then reasonably foresee the potential risk of failing to affix warning labels.

The replacement liner is not a generic component part, but is really a separate product with a specific purpose and use. Surely if the maker of such things as brake systems, elevators, and artillery firing pins, are not immune from liability simply because those products are later incorporated into something else, Hoffinger is likewise not immune from liability. See *Walton v. Avco Corp.*, — Pa. —, 610 A.2d 454 (1992) (manufacturer of helicopter engine found liable along with manufacturer of helicopter).

Furthermore, in *Jacobini*, unlike here, the component part was incorporated into a final

product made defective by another manufacturer. The flaw in Hoffinger's argument is shown by a simple example. Even if we assume that the pool here was manufactured *with* warnings, it is foreseeable that the pool liner will be replaced some day. If the manufacturer fails to affix warnings, as here, the pool becomes defective and dangerous. Someone must bear the risk of injury. To shift the burden to the manufacturer of the pool, the "finished" product, is unreasonable because it manufactured and sold a safe pool.

Since one can foresee that the liner can create a danger from its inherent condition, the risk should fall on the manufacturer of the liner and not the pool manufacturer. Fairness, economic sense, and policies underpinning strict liability demand this result. Indeed, the manufacturer of the pool in this example is no different than the manufacturer of the component part in *Jacobini* and shares the same predicament contemplated there: "no basis [would exist] for requiring the [pool] manufacturer . . . to investigate the use of its [pool] . . . which by itself was inert and safe." See 588 A.2d at 480.

Hoffinger further contends that as a matter of law it had no duty to warn because "the replacement pool liner, itself, could [not] cause the injuries complained of" and because "the danger arises when the component is incorporated into the final product." Br. 12, 13. While it is true that the danger arises only when incorporated into the pool and filled with water, when the danger arises is irrelevant. The only issue is whether the liner was sold in a defective condition because it had no warnings.

Moreover, we are not persuaded by the contention that a pool liner is an inert, innocuous thing simply because by itself, it is physically incapable of injuring a consumer. To hold otherwise implies that "unreasonably dangerous" under Section 402A requires that the product itself actually exert the injury-causing, physical force. But even dynamite is inert, unless ignited. Although a replacement pool liner does not explode, crush, drive, or exert any other physical force, it may through a chain of not so remarkable events cause serious injuries.

The jury was asked in special interrogatories: "Do you find that the replacement vinyl liner sold by Nichols Swim Pools, Inc. was defective, that is, did it lack any element necessary to make it safe for its reasonably foreseeable use?" The jury answered yes. We hold that as a matter of law Hoffinger is not relieved of a duty to warn.

E.

Open And Obvious Danger

The district court allowed the jury to consider whether the pool liner was defective because it lacked depth markers and warnings about the dangers of diving. Hoffinger contends that the danger associated with diving into a body of water of uncertain depth is open and obvious, in other words, that the axiom "look before you leap" should be the law applicable to this case. We disagree.

A "defective condition" includes the lack of adequate warnings for a product's safe use. *Id.* at 478; *Berkebile*, 337 A.2d at 902. See *Thomas v. Arvon Products Co.*, 424 Pa. 365, 227 A.2d 897,

899 (1967) (failure to warn in a negligence action). If a product is defective absent such a warning, and the defect is a proximate cause of the plaintiff's injury, the manufacturer is strictly liable. *Berkebile*, 337 A.2d at 902. If, however, the danger is open and obvious, there is no duty to warn. *Sherk v. Daisy-Heddon*, 285 Pa. Super. 320, 427 A.2d 657, 660 (1981), reversed on other grounds, 498 Pa. 594, 450 A.2d 615 (1982); *Ellis v. Chicago Bridge & Iron Co.*, 376 Pa. Super. 220, 545 A.2d 906, 911 (1988), quoting *Sherk*, 427 A.2d at 660. See *Rice v. Kring*, 310 Pa. 550, 165 A. 833, 835 (1933) (no duty to warn of open and obvious danger in a negligence action).

Unlike the assumption of the risk defense, which requires actual subjective knowledge, *Berkebile*, 337 A.2d at 901; *Berman v. Radnor Rolls, Inc.*, 374 Pa. Super. 118, 542 A.2d 525, 533 (1988), whether a danger is open and obvious is an objective inquiry, not dependent upon the actual knowledge of the user or his actual awareness of the danger. *Sherk*, 427 A.2d at 661 (1981); *Ellis*, 545 A.2d at 911, quoting *Sherk*, 427 A.2d at 661. We inquire whether knowledge of the danger would be possessed by "the ordinary consumer who purchases [or uses the product], with the ordinary knowledge common to the community as to its characteristics." *Sherk*, 427 A.2d at 661, quoting Restatement § 402A, comment (i). For instance, "[i]f the product is one customarily used by children, the danger must be one which children would be likely to recognize and appreciate in order to prevent them from recovering for a product related injury on the grounds that the danger was open and obvious." *Id.*

Although prudence mandates that one check the water's depth, courts gauge the duty to warn not by the "reasonable consumer," *Berkebile*, 337 A.2d at 902, but by the "ordinary consumer." See *id.* at 899; *Lewis v. Duff-Norton Co.*, 515 Pa. 334, 340, 528 A.2d 590, 593 (1987); Restatement § 402A, comment (i). Unlike the law of negligence, product liability laws do not impose a duty upon the consumer; they instead encourage manufacturers to make safe products even for the careless and unreasonable consumer. "A plaintiff cannot be precluded from recovery in a strict liability case because of his own negligence." *Berkebile*, 337 A.2d at 901. The inquiry is whether the product is defective for ordinary use and foreseeable misuse.

It is clearly foreseeable that consumers, children and adults alike, would dive into a pool of unknown depth. Indeed, there was testimony that previous owners of this pool maintained a vigil to watch for divers. One owner testified, "The only thing we ever did was, we were always in the pool if someone was there. And we had, of course, we allowed the children to jump into the pool, but under no circumstances were they allowed to dive into the pool." Another owner testified that on several occasions he saw children dive head first into this pool. When asked what he did when he saw people dive, he said, "I told them don't, don't dive in."

Depth markers and warning labels convey crucial information about the dangers of the pool. They tell one who might think the pool is deep enough that indeed it is not. These measures are necessary to avoid grievous bodily injuries. In *Mucowski v. Clark*, 404 Pa.Super. 197, 590 A.2d

348 (1991), the pool lacked warnings, but the plaintiff had used the pool before and knew its depth. The court held that plaintiff's "foolhardiness," diving into a pool that he knew was four feet deep, was the legal cause of the injury. The court cited and discussed these cases: *Hensley v. Muskin Corp.*, 65 Mich. App. 662, 238 N.W.2d 362 (1975); *Dailey v. Major Pool Equip. Corp.*, 30 N.Y.2d 846, 335 N.Y.S.2d 89, 286 N.E.2d 471 (1972); *Colostmo v. May Dep't Store Co.*, 466 F.2d 1234 (3d Cir. 1972). In each of these cases, plaintiffs knew that the pool was shallow. Here, of course, Fleck thought that this pool was six feet deep. Because the pool was surrounded by elaborate decking, which concealed its sides, a jury could reasonably have concluded that Fleck's perception was plausible. Based upon the appearance of the pool from the photographs in the record, as surrounded by the elaborate decking, and Hubert's testimony that sometimes the pool looked twelve feet deep, a jury could have reasonably concluded that such a perception was plausible. While Fleck may still have been imprudent to do what he did, we cannot say that "foolhardiness" was the cause of the accident. Fleck testified that had there been warnings about the depth of the pool or the danger of diving into this pool, he would not have attempted a dive.

The danger was not open and obvious; so the product was defective, and there was a duty to warn. Hoffinger failed to do so, and the district court properly allowed the jury to consider whether the replacement pool liner lacked an essential element to make it safe.

F.

Fleck's Comparative Negligence

The district court refused to bar recovery or reduce Fleck's verdict although the jury found Fleck to have been 64% negligent. Since determining whether a duty to warn exists "necessarily involves negligence principles such as reasonableness or foreseeability," *Ellis*, 545 A.2d at 912-13, Hoffinger reasons that these negligence principles reduce its liability under the comparative negligence scheme of damage apportionment, or bar Fleck's recovery under the Comparative Negligence Act, 42 Pa. C.S. § 7102(a).

It is true that the determination of a duty to warn necessarily applies negligence principles, but it is the *defendant's* "negligence" that is scrutinized. See *Ellis*, 545 A.2d at 913 (inquiry into duty to warn revolves around whether "the supplier knew, or . . . should have known, of the danger, or where the dangerous use . . . was reasonably foreseeable"). Moreover, even if a plaintiff's negligence is in any way relevant to determine a duty to warn, that does not mean that it is also relevant to damages. The argument that Fleck is barred from recovery under the Comparative Negligence Act in this strict liability case, where the jury expressly found that the product sold was defective, is utterly without merit. *Moran v. G. & W.H. Corson, Inc.*, 402 Pa. Super. 101, 586 A.2d 416, 419 (1991) (the Comparative Negligence Act does not apply to actions sounding in strict liability). See *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 435-44 (3d Cir. 1992) (concluding, after a thorough review of Pennsylvania law, that evidence of plaintiff's negligence is inadmissible in a strict liability case);

McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381, 382 (1975) (rejecting both contributory negligence as a defense to strict liability and a comparative negligence scheme of damage apportionment); *Berkebile*, 337 A.2d at 901 (plaintiff cannot be precluded from recovery in a strict liability case due to his own negligence); *Remy v. Michael D's Carpet Outlets*, 391 Pa. Super. 436, 444-46, 571 A.2d 446, 451 (1990) (plaintiff's comparative negligence is inadmissible in product liability action), allocatur granted, 592 A.2d 1301 (1991).

The argument that the amount of the jury verdict should be reduced by Fleck's comparative negligence is equally frivolous. Hoffinger relies on *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983), which held that notwithstanding the strict liability theory of the case, comparative fault of the plaintiff is applied to reduce the liability of the manufacturer of a defective product. This case is significant, Hoffinger says, because the Pennsylvania Superior Court in *Walton v. Avco Corp.*, 383 Pa. Super 518, 557 A.2d 372, 387 (1989), relied on it to hold that a trier of fact can employ a comparative causation doctrine when apportioning liability between two strictly liable defendants.

The problem is that the Pennsylvania Supreme Court overruled *Walton* on that precise issue. 610 A.2d at 462. The court believed that introducing concepts of fault in the damage-apportionment process would not serve the economic theory of Pennsylvania product liability laws "to place inevitable financial burdens on those best positioned to bear them." *Id.*

The Pennsylvania Supreme Court "has continually fortified the theoretical dam between the notions of negligence and strict 'no fault' liability. It would serve only to muddy the waters to introduce comparative fault into an action based solely on strict liability." *Id.* (citations omitted). We hold that in a case brought under Pennsylvania product liability laws, a plaintiff's comparative negligence is irrelevant either to bar recovery or to reduce the jury award.

G.

Insurance Proceeds

The Flecks petitioned the bankruptcy court to lift the automatic stay of 11 U.S.C. § 362 in Nichols' bankruptcy, representing that any recovery "will be limited solely to the proceeds of the applicable insurance of" Nichols. The bankruptcy court lifted the stay, ordering that any judgment against Nichols "will be limited solely to the proceeds of applicable insurance available to Nichols Swim Pools, Inc." After Hoffinger was found liable, the district court refused to mold the jury verdict to an amount equal to the insurance proceeds available to Nichols. We believe the court erred.

The Flecks' representation to the bankruptcy court judicially estops them in their action against Nichols because they cannot assert a position in this proceeding inconsistent with the one they previously asserted. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988). See generally 18 Wright & Miller, Federal Practice and Procedure, § 4477 (1981).

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689, 15 S.Ct. 555, 558 (1895). Judicial estoppel looks to the connection between the litigant and the judicial system. *Oneida*, 848 F.2d at 419; *Delgrosso v. Spang & Co.*, 903 F.2d 234, 241 (3d Cir. 1990). It preserves the integrity of the courts by preventing litigants from "playing fast and loose with the courts." *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). See *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1220 (6th Cir. 1990). Thus, it is intended to protect the courts rather than the litigants. *In re Cassidy*, 892 F.2d 637, 641 (7th cir. 1990).

The bankruptcy court's order makes clear that that court lifted the automatic stay because the Flecks represented that any judgment will be limited to the insurance proceeds. A party who petitions a bankruptcy court to lift a stay by agreeing to limit the recovery against the protected debtor cannot later collect in its entirety on a judgment that exceeds the agreed upon limit. See *Chance v. Board of Examiners*, 561 F.2d 1079, 1092 (2d Cir. 1977) (parties who make an agreement with the court are bound by their representations).

Although the Flecks cannot collect money in excess of the insurance amount from *Nichols*, there remains the issue of whether they can collect the difference between the amounts of the judgment and the insurance proceeds from *Hoffinger* by its indemnity to Nichols. The Flecks contended before the district court that they have agreed with the bankruptcy court not to execute upon their judgment against Nichols except insofar as the judgments can be collected from "amounts which can be recovered by way of indemnity against Hoffinger or its insurance carrier, thus preserving the general assets of Nichols to satisfy the claims of its other creditors." So, the Flecks believe that they can recover the difference by way of indemnity from Hoffinger to Nichols. We disagree.

Indemnity is a common law equitable remedy that shifts the entire loss from one who has been compelled to pay a judgment to another who should bear it. *Builder's Supply Co. v. McCabe*, 366 Pa. 322, 7 A.2d 368, 370 (1951). See Restatement of Restitution § 76 (1962). The rights and obligations arising from indemnity exist between one who discharged the debt and one who should have discharged it. It is well settled that before any right of indemnification arises, the indemnitee must in fact pay damages to a third party. *F.J. Schindler Equipment Co. v. The Raymond Co.*, 274 Pa. Super. 530, 532, 418 A.2d 533, 534 (1980). See *National Liberty Ins. v. Kling Partnership*, 350 Pa. Super. 524, 504 A.2d 1273, 1278 (1986). The reason for this is obvious: since indemnity shifts the loss, no right accrues until one suffers a loss by paying damages to a third party.

Payment by the indemnitee to the third person "may have been of the entire amount or it may have been a partial payment." Restatement § 76 comment c. So, where one is entitled to be indemnified, under Pennsylvania law that person "should receive reimbursement limited to the amount of his net outlay properly expended because the payor became a party to the transaction through the fault of the other." *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 471 F.Supp. 1059, 1067 (M.D. Pa. 1979), affirmed without opinion 620 F.2d 287 (3d Cir. 1980). See Restatement § 80 (the indemnitee "is entitled to reimbursement, limited to the amount of his net outlay properly expended"). Payment is limited to the amount paid because "[a]lthough there is no fiduciary relation between the parties, the relation is one which is regarded as involving mutual confidence and it would be unfair for the payor to profit at the expense of the principal obligor." Restatement § 80 comment (a).

No matter what the Flecks may have intended, they cannot recover more than what they agreed. The Flecks did not bring a separate claim against Hoffinger. Nichols sued to be indemnified for its exposure. Hence, Hoffinger's liability runs only to Nichols and only to the extent of Nichols' exposure. Hoffinger thus has no legal obligation to pay the judgment to the Flecks. To allow the Flecks to collect the full amount of the judgment by way of indemnity would allow them to do indirectly that which they cannot do directly. Nichols' right of indemnity is to be covered for its actual loss, not the Fleck's. Hoffinger's liability to Nichols is the amount of money Nichols was obligated to pay the Flecks, that is, the amount of insurance proceeds

available to Nichols. We will reverse and remand to mold the jury verdict to the amount of the available insurance proceeds.

III.

CONCLUSION

We summarize our decision as follows:

1. The district court correctly directed verdict for Sylvan and against Fleck under the statute of repose;

2. Hoffinger has waived any right to contest the district court's directed verdict against Hoffinger in Nichols' indemnification action;

3. The district court erred when it refused to award Nichols attorney's fees and costs incurred in the underlying defense litigation in Nichols' indemnification action;

4. A manufacturer of a replacement pool liner has a duty to warn of the depth of the pool or of the dangers of diving;

5. A manufacturer of a replacement pool liner is not relieved of a duty to warn because the dangers of diving into this pool of unknown depth is not open and obvious;

6. Pennsylvania neither recognizes a contributory negligence defense to bar recovery in a strict liability case nor authorizes reducing a plaintiff's damages under a comparative negligence theory;

7. The district court erred when it refused to reduce the jury verdict to an amount equal to the insurance proceeds available to Nichols.

We will therefore reverse the denial of attorney's fees and costs for Nichols and remand for further proceeding, vacate the judgment entered for the Flecks with respect to the damage award and remand with instructions to mold the jury verdict to an amount equal to the insurance proceeds available, and affirm the balance of the district court's order.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK	:	CIVIL ACTION
	:	FILED DEC 6 1991
v.	:	
	:	NO. 89-1348
KDI SYLVAN POOLS, INC., et al.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J December 6, 1991

Several post trial motions were filed in this case. I delayed disposition of them since settlement negotiations continued after the jury verdict. Indeed, some of the motions have been withdrawn.

The post trial motions are:

1. Nichols Swim Pool, Inc's (hereafter Nichols) Motion to Alter and Amend Judgment (Docket No. 200), which has been withdrawn (Docket No. 244),

except as to the Motion for Attorneys Fees and Costs.

2. Motion of Nichols for Stay of Proceedings to Enforce Judgment (Docket No. 201), which has been withdrawn (Docket No. 247).

3. Motion of Nichols and third-party defendant Hoffinger Industries, Inc. (hereafter Hoffinger) for Judgment Notwithstanding Verdict and/or for a New Trial (Docket No. 202). This motion has been withdrawn as to Nichols (Docket No. 246).

4. Motion of Nichols (Supplemental) and third-party defendant Hoffinger to Alter or Amend Judgment (Docket No. 203). This motion has been withdrawn as to Nichols (Docket No. 245).

5. Motion of third-party defendant Hoffinger to Alter or Amend Judgment entered 1/28/91 (Docket No. 228).

6. Motion of third-party defendant Hoffinger for Judgment Notwithstanding the Verdict/and or for a New Trial (Docket No. 229).

7. Motion of Nichols to Enter Final Judgment Against Hoffinger (Docket No. 243).

8. Motion of third-party defendant Hoffinger for Protective Order Pursuant to Rule 26(c) and for Stay of Proceedings to Enforce Judgment Pursuant to Rule 62 (Docket No. 263).

In addition to the above, appeals were filed from this court's granting of a directed verdict in favor of:

1. Fourth-party defendants Poseidon Pools of America and S&V Pools and

against Hoffinger, entered on October 17, 1990;

2. Fourth-party defendant The Gibraltar Corp. and against Hoffinger, entered on October 17, 1990; and

3. Defendant KDI Sylvan Pools, Inc. a/k/a Sylvan Pools and against plaintiffs Richard Fleck and Diane Fleck.

Other appeals as well as the above were filed to the Third Circuit but all were dismissed as untimely, pending disposition of the post trial motions.

Those motions will now be disposed of with the exception of Documents No. 243 and 263 (No. 7 and 8 above), which have been disposed of by separate orders dated December 4, 1991.

I will discuss the remaining post trial motions. The plaintiff is a young man who prior to the accident in this

case possessed physical and mental qualities of an average college graduate. In fact, plaintiff may have been above average in both categories. After his dive into the above ground pool, which rendered him a quadriplegic, he still appears to be intellectually sound but his physical condition has suffered beyond monetary recompense. No one could be unsympathetic to this fine young man and his supportive family.

Thus, it is not surprising that plaintiff won a substantial verdict. But neither the ten million dollars, the amount of the verdict, nor any other dollar amount will ever compensate the plaintiff for the physical condition which he must live with the rest of his life. Defendants argument for remittitur surely must have been included in its

post trial motion merely as a matter of form, not substance.

The real problem here is liability. In its answer to interrogatories comparing the negligence of the plaintiff to the pool owner, James Hubert, the jury not only found the plaintiff to be causally negligent but actually attributed 64 percent of the causal negligence to him.

In its answer to interrogatories on the issue of strict liability, the jury found that the replacement pool liner sold by Nichols was defective and that it was a substantial factor in bringing about plaintiff's harm. It also found that plaintiff did not assume the risk.

Finally, by it's answer to the interrogatory regarding the percentage of causation attributable to the pool liner

and the pool owner, the jury found 60 percent of the causation to be attributable to the pool owner and 40 percent to the pool liner.

When I said earlier that the real problem in this case was liability, I meant that it was difficult to see how the seller of this pool liner could be liable for this accident. Indeed, the jury's answers to interrogatories bears this out to some extent in that they attributed a greater degree of culpability to the plaintiff himself and the pool owner as opposed to the pool liner.

Nevertheless, the standard of review for post trial motions is as follows:

1. For a motion for judgment notwithstanding the verdict, I must

determine whether there is an absence of any substantial evidence to prove liability. Stated in another way, was plaintiff's evidence sufficient to create an issue of fact for the jury.

2. The standard for review of a motion for new trial has been stated in several ways. Among them are:

In deciding a motion for a new trial, the court must ensure that no miscarriage of justice occurred at trial. If the court is convinced that the verdict was not influenced by partiality or prejudice, and that the trial was not infected by injustice, it is the court's duty to respect a plausible jury verdict. See Miller v. Borough of Sharon Hill, No. 88-7962, 1989 U.S. Dist. Lexis 11131, 2-3 (ED Pa.).

A motion for new trial must be granted where the verdict is against the clear weight of the evidence, damages are excessive, the trial was unfair, or where substantial errors were made in the admission or rejection of evidence, or in the giving or refusal of instructions. Alexander v. Red Star Express Lines of Auburn, Inc., 646 F.Supp. 672, 683 (E.D. Pa. 1986) aff'd without opinion 813 F.2d 396 (1987).

Finally, a district court has considerable discretion whether to grant a new trial. American Bearing Co. v. Litton Industries, 729 F.2d 943, 948 (3d Cir.).

With those standards in mind, I have reviewed the arguments in this case as set forth in the briefs filed in

support of the post trial motions, together with the briefs in opposition.

Preliminarily, it should be noted that the post trial motions regarding the party against whom the plaintiff won its verdict, namely Nichols (see 1 through 4 above) have been withdrawn by Nichols. The question arises as to whether Hoffinger has any standing to pursue its motions since no judgment has been entered against it in favor of the plaintiff. Assuming that it does have standing since a verdict against Nichols obviously affects Hoffinger against whom a directed verdict was entered in favor of Nichols, I will proceed to discuss those motions.

In their joint brief in support of post trial motions, Nichols and Hoffinger raise 11 arguments.

In its first argument, defendants seek a judgment notwithstanding the verdict on the basis that plaintiff's claim fails to establish the essential elements of proximate cause.

Plaintiff's claim that the pool liner sold by Nichols and manufactured by Hoffinger was defective was based on the theory that it lacked informational signs and warnings. No signs designating the depth of the pool were affixed to the liner and no warnings were affixed to it that diving in a pool of the depth of the one in question may result in serious injury.

We agree with Nichols and Hoffinger that the evidence must support a reasonable inference and not merely a guess that the existence of adequate warnings would have prevented plaintiff's

accident. However, I find that there was no lack of substantial evidence in plaintiff's case on the issue of proximate cause. Reference is made to the argument beginning on the second page of plaintiff's brief (Document No. 238) with which I concur.

As its second argument, defendants again seek judgment notwithstanding the verdict on the basis that plaintiff assumed the risk. Again, I agree with defendants' statement of the law and in particular to the reference that voluntary assumption of the risk rests upon the subjective awareness of the defect. Simply stated, plaintiff testified that the pool looked more than six feet deep. The jury, in addition to hearing testimony, actually went to the scene of the accident and viewed the

pool. Based on plaintiff's testimony as well as their own view, the jury could rationally conclude that plaintiff was not aware of the 3 1/2 foot depth of the pool.

In its third argument, defendants state that the danger of diving into a body of water of uncertain depth is within the common knowledge of all reasonable persons. It is clear from the testimony that it was within the knowledge of the plaintiff himself in this case. However, that is not the point at issue. The point is did the plaintiff himself know or should he have known that the pool was shallow? The plaintiff said he did not know it was shallow, and the jury could find that under the circumstances including the grandiose structure which surrounded the

pool, the particular lighting and shadows at the time of the accident and the fact that others dived into the pool, that plaintiff's failure to know that the pool was shallow was not unreasonable.

Argument IV of defendants' brief has to do with the court's directing a verdict in favor of defendants, KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, Poseidon Pools of America, S&V Pools, Inc. and the Gibraltar Corp. For sake of continuity in discussing the Nichols and Hoffinger arguments regarding the plaintiff's verdict against Nichols, I will postpone discussion of Argument IV and move on to Argument V wherein defendants argue that the verdict against Nichols must be reduced by the pro rata share of fault of the pool owner, James Hubert. This argument is based upon the

release Hubert Signed prior to the commencement of the trial which provided, inter alia:

> "In any action in which Hubert is found to be a tortfeasor together with one or more others, it is agreed that any verdict rendered against one or more of the other alleged tortfeasor shall be reduced by the pro rata or comparative shares of Hubert, and any judgment entered on said verdict shall be in amount of the verdict reduced by the share of Hubert, either pro rata or by percentage under the Pennsylvania Comparative Negligent Statute, whichever is applicable in the circumstances."

Hubert was not found to be liable to the plaintiff, however, in that his causal negligence was less than 50 percent, (36 percent).

In Argument VI, defendants state that Nichols was entitled to a reduction

of the verdict by the amount of plaintiff's comparative fault assessed in the negligence action plaintiff brought against Hubert. I do not believe that the existing law of strict liability provides for a reduction of an award made to plaintiff on a strict liability theory based on any negligence of plaintiff. Walton v. Avco Corp., 557 A.2d 372, 383 Pa. Super. 518 (1989), cited by defendants does not apply to this case. In that case, the question was whether in a strict liability case, comparative fault should be the rule of law for the apportionment of damages between defendants.

In Arguments VII and XI, the defendants alleged that the court erred in assessing delay damages. Delay damages were directly assessed from the

date the complaint was filed (February 23, 1989) until the verdict was returned (October 22, 1990), on the full amount of the verdict and not based upon the amount of applicable insurance available to Nichols.

Argument VIII by defendants is for remittitur because the damages are so unreasonable as to offend the conscience of the court. While I have no trouble finding against the defendant on this issue, I do think it is interesting to note that plaintiff devotes more time to this argument than any other aspect of this case emphasizing, it seems to me, my primary concern with this whole trial. That concern was and is: Was this trial influenced to such a degree by prejudice in favor of and partiality towards the plaintiff that an unjust verdict

resulted? As is suggested by what is already set forth in this opinion, I have concluded that the evidence does support the verdict if viewed in a light most favorable to the verdict winner, and while one may have a strong suspicion that sympathy for the plaintiff played a substantial role in the outcome, I must respect a plausible verdict of the jury.

As its ninth argument, defendants state that they were denied a fair trial as a result of the failure to dismiss James Hubert as a defendant following the settlement he reached with plaintiff extinguishing his liability to plaintiff. For reasons which are not apparent on the record, defendants did not choose to raise this objection prior to or during the trial. It is the court's recollection that defense had no

objection to keeping defendant Hubert as a party at the trial. The doctrine of waiver for failing to object applies in this instance. Most importantly, however, I do not feel that in this case the defendants were deprived of a fair trial by the presence of Hubert.

In its tenth argument, defendants contend that the Pennsylvania Comparative Negligence Statute should be applied to this failure to warn strict product liability action. No case has been offered to suggest that this is the law of Pennsylvania, however.

I now return to Argument IV. The record is clear that Hoffinger waived any objection it might have had to the motion for directed verdict on behalf of KDI Sylvan Pools, Inc. a/k/a Sylvan Pools. In granting the motion, I also dismissed

the claims against Gibraltar and Poseidon Pools who were third-party defendants joined only by KDI Sylvan. The KDI Sylvan Pool brief (Docket No: 241) at pages 4, 5 and 6 accurately point out when and where the waiver occurred.

As to the plaintiff's claim against KDI Sylvan Pools, Inc. a/k/a Sylvan Pools, no motion is before me as they have appealed my decision on the directed verdict directly to the Third Circuit Court of Appeals.

With regard to that however, I would note that ordinarily I am reluctant to grant a directed verdict. Most commentators in procedural textbooks suggest that caution be exercised in the granting of such a motion. The reason for caution is obvious because the burden to overcome such a motion is not great.

In plaintiff's case against KDI, however, there was a total lack of substantial evidence to support plaintiff's contention that somehow the installer of the pool in this case not the pool liner, should be held liable. The evidence or lack of evidence submitted by plaintiff in this case, which included the jurors' actual visit and view of the pool as it existed at the time of the accident, supports the conclusion that this was an entirely different pool complex than what left the manufacturer some 15 years before the accident as a simple above ground pool.

The final argument before me concerns Hoffinger's motion (See 5 and 6 above) with regard to the directed verdict entered against it. In Section A of its brief (Docket No. 240), Nichols

sets forth why Hoffinger has waived all objections to the directed verdict, a position I subscribe to as well.

Based upon the foregoing opinion, the following order is entered:

O R D E R

1. Nichols Swim Pool, Inc.'s Motion to Alter and Amend Judgment (Docket No. 200) is WITHDRAWN, except as to its Motion for Attorneys Fees and Costs which is DENIED.

2. The motion of Nichols Swim Pools, Inc. for a Stay of the Proceedings to Enforce Judgment (Docket No. 201) is WITHDRAWN.

3. The motion of Nichols Swim Pools, Inc. and third-party defendant Hoffinger Industries, Inc. for Judgment Notwithstanding the Verdict and/or for New Trial (Docket No. 202) is WITHDRAWN

as to Nichols, and is DENIED as to Hoffinger.

4. The motion of Nichols Swim Pools, Inc. (Supplemental) and third-party defendant Hoffinger Industries, Inc. to Alter or Amend Judgment (Docket No. 203) is WITHDRAWN as to Nichols, and DENIED as to Hoffinger.

5. The motion of third-party defendant Hoffinger to Alter or Amend Judgment Entered 1/28/91 (Docket No. 228) is DENIED.

6. The motion of third-party defendant Hoffinger for Judgment Notwithstanding the Verdict/and or for a New Trial (Docket No. 229) is DENIED.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD FLECK and DIANE FLECK	:	CIVIL ACTION
	:	FILED NOV 21 1990
v.	:	
	:	NO. 89-1348
NICHOLS SWIM POOLS, INC., JAMES HUBERT	:	
v.	:	
	:	
DOUGHBOY RECREATIONAL, INC., a Division of HOFFINGER INDUSTRIES, INC.	:	

CIVIL JUDGMENT

Before HONORABLE RONALD L. BUCKWALTER

AND NOW, this 20TH day of NOVEMBER 1990 in accordance with the jury's answers to interrogatories plus delay damages to which plaintiffs are entitled

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Richard Fleck and Diane Fleck, now Diane Kaskoun for delay damages in the amounts

of $1,750,000 and $43,750, respectively. Therefore, judgment is entered in favor of Richard Fleck against Nichols Swim Pools, Inc. in the amount of $11,750,000, and judgment is entered in favor of Diane Fleck, now Diane Kaskoun against Nichols Swim Pools, Inc. in the amount of $293,750.

Judgment is entered in favor of defendant James Hubert and against plaintiffs Richard Fleck and Diane Fleck, now Diane Kaskoun. On the claim of defendant Nichols Swim Pools, Inc. against third-party defendant Doughboy Recreational, Inc., for attorneys fees and costs, judgment is entered in favor of Doughboy Recreational, Inc. and against Nichols Swim Pools, Inc.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

(2)

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-1305

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DOUGHBOY RECREATIONAL, INC., A Division of Hoffinger Industries, Inc.,

Petitioner,

v.

RICHARD FLECK, DIANE FLECK, Nichols Swim Pools, Inc., James Hubert, KDI Sylvan Pools, Inc., Poseidon Pools of America, The Gibraltar Corp., and S & V Pools, Inc.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, NICHOLS SWIM POOLS, INC.

Harry G. Mahoney, Esquire
DEASEY, MAHONEY, BENDER & MCKENNA, LTD.
Three Parkway
Suite 1400
Philadelphia, PA 19102-1374
(215) 587-9400
Counsel for Respondent and Counsel of Record of Nichols Swim Pools, Inc.

K. Craig McChesney, Esquire
DEASEY, MAHONEY, BENDER & MCKENNA, LTD.
Three Parkway
Suite 1400
Philadelphia, PA 19102-1374
(215) 587-9400
Counsel for Respondent Nichols Swim Pools, Inc.

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

18 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. HOFFINGER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE JURY'S VERDICT, BASED ON THE AMPLE EVIDENCE THAT THE LACK OF WARNINGS ON THE REPLACEMENT POOL LINER WAS A SUBSTANTIAL CAUSE OF MR. FLECK'S INJURIES.	4
II. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT VIOLATE HOFFINGER'S RIGHT TO EQUAL PROTECTION	6
III. HOFFINGER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT VIOLATED.	7
IV. THE VERDICT WAS BASED ON A LEGALLY SUPPORTABLE CLAIM	10
V. THE THIRD CIRCUIT HOLDING THAT THE MANUFACTURER OF A REPLACEMENT LINER HAS A DUTY TO WARN POTENTIAL USERS OF THE DANGERS ASSOCIATED WITH THAT PRODUCT IS CONSISTENT WITH CONTROLLING PENNSYLVANIA LAW.	10
VI. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT TO NOT EXTEND THE STATUTE OF REPOSE TO THE SELLER AND MANUFACTURER OF THE REPLACEMENT LINER	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: Page

Black v. Henry Pratt, 778 F.2d 1278 (7th Cir. 1985) 13

E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed. 2d 19 (1986) 4, 6, 8

F.T.C. v. Grolier, Inc., 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed. 2d 387 (1983) 4

Fleck v. KDI Sylvan Pools, 981 F.2d. 107 (3d. Cir. 1992) 7

Hinds v. Compair Kellogg, 776 F.Supp 1102 (E.D. Va 1991) 14

Jacobini v. V. & O. Press Co., 588 A.2d 476 (Pa. 1991) 11

Matusky v. Haugh's Pools, 610 A.2d 474 (Pa. Super. 1992) 6

Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed. 2d 1012 (1982) 4

Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d. Cir. 1985) 9

Restatements:

Restatement of Torts, (Second) §402A 2, 11

Constitution Provisions:

Amendment V, United States Constitution 5, 6

Amendment VII, United States Constitution 8

Statutes:

42 Pa. C.S.A. §5536 ..... 12, 13

No. 92-1305

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DOUGHBOY RECREATIONAL, INC., A Division of Hoffinger Industries, Inc.,

Petitioner,

v.

RICHARD FLECK, DIANE FLECK, Nichols Swim Pools, Inc., James Hubert, KDI Sylvan Pools, Inc., Poseidon Pools of America, The Gibraltar Corp., and S & V Pools, Inc.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

As set forth in Hoffinger's Petition, this is a products liability case arising from personal injuries suffered by Plaintiff, Richard Fleck, when he dove into an above-ground swimming pool on August 8, 1987, injuring his vertebrae and rendering him a quadriplegic. Plaintiff

instituted this action against James Hubert, the owner of the pool where the accident took place, KDI Sylvan Pools (hereafter referred to as "KDI"), the distributor of the pool, and Respondent, Nichols Swim Pools Inc., (hereafter referred to as "Nichols Pools"), the distributor of a replacement liner that was in place in the pool at the time of the accident. In pleadings and at trial, Plaintiff proceeded against Nichols Pools solely on a strict liability theory, predicated on §402 of the Restatement of Torts (Second). Nichols Pools joined the manufacturer of the pool liner, Doughboy Recreational, Inc., a division of Hoffinger Industries, Inc. (hereafter referred to as "Hoffinger"), as a third party defendant. KDI joined the pool manufacturers (hereafter referred to as "pool defendants") as third party defendants.

During trial, the District Court directed a verdict in favor of KDI and the other pool defendants and against all parties, citing the Statute of Repose and other unspecified reasons. 1253a-1256a. In addition, the District Court directed a verdict in favor of Nichols Pools and against Hoffinger on Nichols Pools' claim for indemnity. Hoffinger did not oppose this directed verdict and does not challenge the propriety of the directed verdict before this court.

At the conclusion of the liability phase of the bifurcated trial, the jury found that plaintiff's causal negligence exceeded that of James Hubert, and accordingly, found in favor of Mr. Hubert. The jury further found that the pool liner was defective and that the defect was a substantial cause of plaintiff's injuries, and thus found in favor of plaintiff and against Nichols Pools. Nichols Pools subsequently settled with plaintiff and has sought to have its indemnity judgement satisfied by Hoffinger.

The United States Court of Appeals for the Third Circuit upheld the verdict in favor of plaintiff and against Nichols Pools, as well as the directed verdict in favor of Nichols Pools and against Hoffinger. The Court of Appeals also upheld the directed verdict in favor of KDI and against plaintiff. Hoffinger now petitions this

Honorable Court for Writ of Certiorari, challenging the verdict entered in favor of plaintiff and against Nichols Pools.

SUMMARY OF THE ARGUMENT

Hoffinger does not challenge the constitutionality of Pennsylvania law, but contends that the District Court and the Court of Appeals have violated Hoffinger's constitutional rights through various holdings at trial and on appeal. In addition, Hoffinger argues that the holdings of the District Court and the Court of Appeals are contrary to controlling Pennsylvania precedent. As set forth below, these arguments are frivolous and uniformly without merit. Furthermore, Hoffinger did not raise its alleged constitutional violations before either the District Court or the Court of Appeals, and accordingly, has waived those arguments. In addition, in its Petition, Hoffinger misrepresents the testimony which supports the jury's verdict against Nichols Pools and Hoffinger in this matter. Nichols Pools addresses each of those questions presented by Hoffinger for review.[1]

---

1. Plaintiffs, Richard Fleck and Diane Fleck, join in the Brief of Nichols Swim Pools, Inc. and adopt the arguments therein.

ARGUMENT

I. HOFFINGER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE JURY'S VERDICT BASED ON THE AMPLE EVIDENCE THAT THE LACK OF WARNINGS ON THE REPLACEMENT POOL LINER WAS A SUBSTANTIAL CAUSE OF MR. FLECK'S INJURIES

A. Hoffinger Did Not Raise The Alleged Violation Of Its Fifth Amendment Rights In Its Post Trial Motions Or Before The Court of Appeals And Therefore Has Waived This Argument.

In its Petition for Writ of Certiorari, Hoffinger presents three questions for review based on alleged violations of Hoffinger's constitutional rights. Hoffinger claims its right to both due process and equal protection under the Fifth Amendment of the United States Constitution, and Seventh Amendment right to trial by jury were all violated by the District Court. However, Hoffinger did not raise any of these constitutional arguments in its Post-Trial Motions to the District Court or on appeal to the Third Circuit. Accordingly, Hoffinger has waived the alleged violation of its constitutional rights presented in Questions I, II, and III of its Petition for Writ of Certiorari. "Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority,* 106 S.Ct. 1678, 1681, 476 U.S. 19, 90 L.Ed. 2d 19 (1986) *See also, F.T.C. v. Grolier, Inc.,* 462 U.S. 19, 23 n.6, 103 S.Ct. 2209, 76 L.Ed. 2d 387(1983) (Respondent did not raise issue before the District Court or the Court of Appeals and Supreme Court declined to address it), *Rogers v. Lodge,* 458 U.S. 613, 628 n.10, 102 S.Ct. 3272, 73 L.Ed. 2d 1012 (1982) (Argument not properly raised in Court of Appeals would not be addressed by Supreme

Court). Based on the clear law set forth above, Hoffinger has waived its alleged constitutional violations.

B. The Jury Verdict Did Not Violate The Fifth Amendment Of The United States Constitution Because There Was Ample Evidence Of Causation To Support Verdict.

Hoffinger contends that there was no evidence of causation between the defective warnings of the liner and Mr. Fleck's injury, and therefore, the finding of liability against Hoffinger violates Hoffinger's Fifth Amendment right to due process. Interestingly, Hoffinger does not cite any cases in which a jury's verdict in a product's liability action violated a defendant's rights to due process. The due process rights of the defendants in the cases cited by Hoffinger were all violated in either criminal, or quasi-criminal actions such as alien deportation or school disciplinary proceedings. Not one case cited by Hoffinger is evenly remotely similar to the product's liability action tried by the District Court.

Even if a verdict by the jury can violate a defendant's constitutional rights in a civil suit, there was sufficient evidence of causation to support the verdict. At time of trial, plaintiff, Richard Fleck, testified that prior to diving into the pool he looked at both the deck and the pool itself. Based on his view of the pool, he believed it was over six feet deep and that if he had known the actual depth of the pool as 3½ feet deep, he would not have dived. 524a-527a.

Clearly there was sufficient evidence to create an issue of fact for the jury that the lack of any warnings was a substantial factor in causing Richard Fleck's injuries. Furthermore, Hoffinger ignores one of the arguments put forth by plaintiff at time of trial that the liner itself should have been made in contrasting colors which would haven given Mr. Fleck some reference as to the depth of the water. 620a. Mr. Fleck testified that he did look at the bottom of the pool, and accordingly

would have seen any warning signs or contrasting colors had they been there. Clearly, sufficient evidence was presented at time of trial for the jury to conclude that the defective condition of the liner was a substantial cause of Mr. Fleck's injuries. Therefore, the verdict cannot be said to be so unfair as to deprive Hoffinger of its constitutional right to due process.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT VIOLATE HOFFINGER'S RIGHT TO EQUAL PROTECTION.

A. Hoffinger Has Waived Its Equal Protection Argument.

As set forth in Argument I, Hoffinger did not previously raise any constitutional violations in its Post Trial motions to the District Court or on appeal to the Third Circuit. Accordingly, under *E.E.O.C. v. Federal Labor Relations Authority, supra,* Hoffinger has waived these arguments.

B. Hoffinger's Right To Equal Protection Was Not Violated.

Hoffinger contends that the Court of Appeals' decision treats similarly situated manufacturers of swimming pool component parts differently, and accordingly, violates Hoffinger's right to equal protection under the due process provision of the Fifth Amendment. In support of this position, Hoffinger cites the decision of the Pennsylvania Superior Court in *Matusky v. Haugh's Pools,* 610 A.2d 474 (Pa. Super. 1992). In *Matusky,* the Superior Court upheld the trial court's order granting Summary Judgment for the manufacturer, distributor and seller of the pool. The Court held that the plaintiff assumed the risk of his injuries because he was familiar with the pool, had used it on prior occasions, knew that the depth of the pool was four feet deep, and that the

water line was somewhere between plaintiff's naval and waist. *Id.* at 476.

In the case at hand, Mr. Fleck had not used the pool on previous occasions, and was not aware of the actual depth of the pool. Mr. Fleck testified that based on his view of the pool he believed, inaccurately, that the pool was over six feet deep. Because Mr. Fleck was not aware of the actual depth of the pool, the jury properly found that Mr. Fleck did not assume the risk of diving into the pool. Accordingly, the *Matusky* decision is inapplicable to the facts of the present matter.

Hoffinger argues that the law should not differentiate between those individuals who act with subjective knowledge of a specific risk and those individuals who act without such knowledge. However, this is not the law in the Commonwealth of Pennsylvania, or any other state that has adopted the defense of "assumption of the risk" in strict liability cases. While Hoffinger may take issue with the result of this defense, its application does not violate Hoffinger's right to equal protection.

Hoffinger inaccurately claims that "the Third Circuit held that despite the fact that a danger is open and obvious, there is a duty to warn individuals who are subjectively careless and unreasonable when they misjudge the depth of the water of admittedly unknown depth." This clearly misstates the position of the Third Circuit. At no time did the Court hold that the danger of diving into this pool was open and obvious. To the contrary, the Third Circuit specifically stated "[t]he danger was not open and obvious; so the product was defective, and there was a duty to warn." *Fleck v. KDI Sylvan Pools,* 981 F.2d. 107, 120 (3d. Cir. 1992).

III. HOFFINGER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT VIOLATED.

A. Hoffinger Has Waived This Argument.

As with arguments I and II, Hoffinger has not previously raised the alleged violation of its right to jury

trial in its Post-Trial motions or on appeal to the Third Circuit. Accordingly, under *E.E.O.C. v. Federal Labor Relations Authority, supra,* Hoffinger has waived this alleged constitutional violation.

B. The District Court Did Not Violate Hoffinger's Seventh Amendment Right To Trial By Jury

Hoffinger contends that the District Court violated Hoffinger's Seventh Amendment right to trial by jury by failing to instruct the jury as to whether the pool deck built around the pool was an intervening superseding cause of Mr. Fleck's injuries. Even if the District Court's instructions were in error, that jury instruction is not tantamount to a violation of Hoffinger's Seventh Amendment right.

Hoffinger correctly states that there is a right to trial by jury for damages involving personal injuries and that a litigant is entitled to have the jury instructed as to any defenses or theories of law if supported by evidence and brought to the attention of the Court. However, Hoffinger has not provided any case law to support its position that the failure by the trial judge to instruct the jury on a particular point violates a defendant's Seventh Amendment right. It is obvious from the record that Hoffinger was not denied its right to a trial by jury, and that this one particular issue was not submitted to the jury. If Hoffinger's argument is accepted by this Court, all defective jury instructions would result in a Seventh Amendment violation. Hoffinger has not provided any cases to support this peculiar position because none exists.

C. The Trial Court Was Correct In Not Instructing The Jury On The Theory Of Intervening Superseding Cause

The District Court was correct in not instructing the jury on the issue of intervening superseding cause, because the facts of the case did not warrant it. The case

law is clear that "only where the third party's action is 'so extraordinary as to not have been reasonably foreseeable' might such action constitute a superseding cause." *Van Buskirk v. Carey Canadian Mines,* 760 F.2d 481, 495 (3d. Cir. 1985) (citation omitted). In the case at hand, there was ample testimony at the time of trial to support plaintiff's assertion that the construction of the deck around the pool was foreseeable. Plaintiff demonstrated this, in part, by using Hoffinger's own advertisements showing pools with whole or partial decks added to the perimeter of the pool. Accordingly, the District Court properly did not instruct the jury as to intervening superseding cause. As such, there can be no violation of Hoffinger's Seventh Amendment right by the District Court's instructions.

Furthermore, Hoffinger misstates the District Court's holding in its Petition for Writ of Certiorari. Hoffinger contends that "Judge Buckwalter, on page 11 of his 12/06/91 Memorandum and Order Denying Post-Judgment Motions ruled that the construction of the deck by Hubert was, as a matter of law, an unforeseeable intervening cause which operated to exonerate the pool defendants. On these facts, Hoffinger contends that the District Court's refusal to instruct on this issue deprived Hoffinger of its Seventh Amendment right to trial by jury."

Hoffinger's Petition misrepresents the Court's Order. In fact, the District Court held that the record is clear that Hoffinger waived any objection it might have had to the Motion for Directed Verdict on behalf of KDI. 2450a. The court went on to state that the evidence or lack of evidence submitted by plaintiff in the case "supports the conclusion that this was an entirely different pool complex than what left the manufacturer some 15 years before the accident as a simple above ground pool." KDI had motioned the Court for a directed verdict on seven separate grounds, including the Statute of Repose. 2339a. At no point did the Trial Court hold that

the pool deck was, as a matter of law, a superseding intervening cause of plaintiff's injuries.

IV. THE VERDICT WAS BASED ON A LEGALLY SUPPORTABLE CLAIM

Hoffinger contends that the liability verdict in favor of the Flecks and against Nichols Pools should be set aside because it is not possible to determine whether the jury's verdict rested on a legally supported claim. In support of its arguments, Hoffinger claims that Mr. Fleck testified that he did not know the depth of the water of the pool, but that he knew that he should not dive into a pool of unknown depth. Because the danger was known to Mr. Fleck, there is no duty on Hoffinger's part to provide "no diving" warnings. Again, counsel for Hoffinger misstates the trial testimony. Mr. Fleck testified that he believed the true depth of the pool was over six feet deep. 524a. Mr. Fleck testified that if he had known there was only 3½ feet of water, and had there been a warning sign to that affect, he would not have dived into the pool. 527a. Tragically, Mr. Fleck was wrong in his assessment of the depth of the water. However, this is not the same as Hoffinger's assertion that Mr. Fleck had a subjective awareness of the danger diving into this pool. Clearly, the jury's verdict of liability against Nichols Pools is amply supported by the record.

V. THE THIRD CIRCUIT'S HOLDING THAT THE MANUFACTURER OF A REPLACEMENT LINER HAS A DUTY TO WARN POTENTIAL USERS OF THE DANGERS ASSOCIATED WITH THAT PRODUCT, IS CONSISTENT WITH CONTROLLING PENNSYLVANIA LAW

Hoffinger argues that under Pennsylvania law, a manufacturer of a replacement pool liner owes no duty to potential users of that product to warn of the dangers associated with the use of the product. Hoffinger contends that the Third Circuit's opinion is contrary to

controlling Pennsylvania precedent and that this Court should grant Certiorari in order to correct the Third Circuit's error. However, the Third Circuit has correctly stated Pennsylvania law.

Pennsylvania law has long held that a manufacturer's failure to warn of a latent danger in the use or operation of the product can render a properly designed product unreasonably dangerous and defective for purposes of strict product's liability. (See *Restatement of Torts,* (Second) §402A). The exception cited by Hoffinger in *Jacobini* is clearly distinguishable from the facts of the present case. *Jacobini v. V & O Press Co.,* 588 A.2d 476 (Pa. 1991). The court in Jacobini had held that the facts of the case did not require the court to submit to the jury the question of the manufacturer's duty to warn, "on the basis that the evidentiary record was simply not sufficient to support submission of a 'failure to warn' theory to the jury." (*Id.* at 478). Nevertheless, in dicta, the Court did agree that there are limits on the manufacturer's duty to warn where:

> the manufacturer supplies a mere component of a final product that is assembled by another party and dangers are associated with the use of the finished product . . . *this is particularly true where the component itself is not dangerous, and where the danger arises from the manner in which the component is utilized by the assembler of the final product,* this being a matter over which the component manufacturer has no control.

Id. at 479 (Citations omitted, emphasis supplied).

The Third Circuit properly held that the limitations on a manufacturer's duty to warn were inapplicable to the present facts. The Court in *Jacobini* explained that the manufacturer of a die set "cannot be expected to foresee every possible risk that might be associated with use of a completed product, the die, which is manufactured by another party, and warn of dangers in using that completed product in yet another party's finished

product, the power press." *Id* at 480. The Third Circuit held that the facts of *Jacobini* are clearly distinguishable from the facts in the case at hand. Unlike the die set, Hoffinger did not manufacture a mere component of a final product, but manufactured a replacement liner that was sold to the consumer in the same condition in which it left Hoffinger. The dangers which were associated with Hoffinger's pool liner existed at the time the liner left Hoffinger's hands.

Accordingly, the Third Circuit's decision was consistent with Pennsylvania law because the limitations set forth in *Jacobini* are inapplicable to the facts in the present matter.

VI. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT NOT TO EXTEND THE STATUTE OF REPOSE TO THE SELLER AND MANUFACTURER OF THE REPLACEMENT LINER

Hoffinger next argues that the District Court and Court of Appeals erred in not extending the benefits of the Statute of Repose to the pool liner defendants. This statutory provision provides an exemption from liability as follows:

§5536. Construction Projects

> (a) General rule.—Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property *must be commenced with 12 years after completion of construction of such improvement to recover damages for:*
>
> > (1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

* * * *

> (3) Injury to the person or for wrongful death arising out of any such deficiency.

42 Pa.C.S.A. §5536 (emphasis supplied).

Assuming, arguendo, that the Statute of Repose even applies to the manufacturer or distributor of a replacement pool liner, the length of time between the sale of this product and commencement of plaintiff's lawsuit is clearly well short of the time period required by the statute. According to the testimony presented at trial, a replacement liner was sold to Jerry Jolly, the previous homeowner, by Nichols Pools, in 1983. This liner developed leaks and was replaced in the Spring of 1984. Plaintiff's injuries occurred on August 8, 1987, and suit was initiated in 1989. The time period between the sale of the second replacement liner and commencement of Mr. Fleck's action was five years, well short of the twelve year statutory period required by §5536.

Hoffinger argues that the statutory period for its replacement liner should actually begin at the moment of the sale of the original pool. In support of this position, Hoffinger cites the case of *Black v. Henry Pratt,* 778 F.2d 1278 (7th Cir. 1985). In *Black,* the Seventh Circuit interpreted Indiana's Product Liability Act and held that the Statute of Limitations in tort for the sale of a replacement part began running with the sale of the original product. However, the Court in *Black* clearly stated that this extension of the Indiana statute applies only when the replacement part is non-defective in and of itself. Id. at 1248. In *Black,* the only allegation that the replacement part contributed to the defect was that it allowed the final product to work. As previously stated, the Jury in the instant matter found that the liner itself was defective. While it is obvious that the liner needed the other parts of the swimming pool in order to operate, the answer to Jury Interrogatory No. 6 clearly reflects that the Jury found that the replacement liner itself was defective and lacked sufficient warnings to make the

product safe. Furthermore, the Seventh Circuit applied an Indiana statute which has no bearing in this case.

Hoffinger also cites the case of *Hinds v. Compair Kellogg,* 776 F.Supp 1102 (E.D. Va 1991). In *Hinds,* the court also applied the Indiana Statute of Repose. Presumably, Hoffinger contends that this Court should grant Certiorari because the Third Circuit's opinion is contrary to controlling Pennsylvania precedent. However, Hoffinger cites two cases, both interpreting Indiana's Product Liability Act. In fact, Hoffinger does not cite any Pennsylvania cases to support its position. As there is no question that Pennsylvania law is controlling, Hoffinger's omission is curious.

Based on the unambiguous language of Pennsylvania's Statute of Repose, it is clear that the District Court and Court of Appeals were correct not to extend the statute to Hoffinger.

CONCLUSION

Hoffinger has not presented any compelling reason why this Court should grant Certiorari to consider the questions raised therein. Hoffinger did not offer either the District Court or the Court of Appeals an opportunity to review the constitutional questions presented in Questions I, II, and III, and has therefore waived those issues. Furthermore, none of Hoffinger's arguments are supported by the facts set forth in the record nor in the applicable constitutional or Pennsylvania law. Therefore, Nichols Pools submits that this Court should deny Hoffinger's Petition for Writ Of Certiorari.

Respectfully submitted,

Harry G. Mahoney, Esquire
DEASEY, MAHONEY, BENDER
& MCKENNA, LTD.
Three Parkway, Suite 1400
Philadelphia, PA 19102-1374
(215) 587-9400

Counsel for Respondent and Counsel of Record for Nichols Swim Pools, Inc.

K. Craig McChesney, Esquire
DEASEY, MAHONEY, BENDER
& MCKENNA, LTD.
Three Parkway, Suite 1400
Philadelphia, PA 19102-1374

Counsel for Respondent